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Supreme Court, U.S.
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In The

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

v.

KATHY KROSKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, contrary to the Sixth Circuit and the California Supreme Court, that the National Bank Act's grant to national banks of the power to dismiss their officers "at pleasure," 12 U.S.C. § 24 (Fifth), fails to preempt a state employment discrimination law because the applicability of a federal employment discrimination law enacted by Congress subsequent to the National Bank Act somehow makes state law applicable as well.

2. Whether the Ninth Circuit erred in holding, contrary to the Second and Sixth Circuits and this Court's precedents, that a presumption against preemption permits state laws to apply to national banks despite the longstanding preemptive force of the National Bank Act.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of USB Holdings, Inc., which in turn is a wholly owned subsidiary of U.S. Bancorp. U.S. Bancorp has no parent corporation and no publicly held corporation owns 10% or more of U.S. Bancorp's stock.

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PETITION FOR A WRIT OF CERTIORARI

U.S. Bank National Association (U.S. Bank) respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (App., *infra*, 1a-25a) is reported at 432 F.3d 976 (9th Cir. 2006), and the order amending the opinion on rehearing (App., *infra*, 2a) is reported at 432 F.3d 976. The opinion of the district court granting petitioner's motion for summary judgment (App., *infra*, 50a-61a) and its opinion on jurisdiction (App., *infra*, 62a-66a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 2005. App., *infra*, 50a-61a. A petition for rehearing or rehearing *en banc* was denied and an amended opinion was filed on February 13, 2006. App., *infra*, 1a-25a. Justice Kennedy, on May 8, 2006, granted an extension of time within which to file a petition for a writ of *certiorari* to and including June 13, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the Supreme Law of the land."

Section 8 of the National Bank Act, 12 U.S.C. § 24 (Fifth), is reprinted in the appendix to this petition at App., *infra*, 68a.

Relevant provisions of the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, are reprinted in the appendix to this petition at App., *infra*, 69a.

Relevant provisions of the Washington Law Against Discrimination, Wash. Rev. Code §§ 49.60.010-400, and Washington labor regulations, Wash. Rev. Code § 49.44.090, are reprinted in the appendix to this petition at App., *infra*, 71a-80a.

INTRODUCTION

From the earliest days of the Nation's founding, Congress and this Court have recognized the supremacy of federal law that governs federally chartered banks over all state law. Time and time again, this Court has ruled that the powers conferred to national banks by Congress through the National Bank Act are impervious to state interference, control, or regulation. Only the federal government, through Congress or the authority it has conferred on federal banking agencies, can limit the preemptive scope of federal banking law. States cannot, on their own accord, apply their state laws or otherwise subject national banks to state regulation.

The Ninth Circuit, however, has ignored this basic founding era tenet. The court of appeals ruled that state employment laws apply to the dismissal of national bank officers, based on its belief that the application of *federal* employment discrimination laws to national banks somehow opened the door for the imposition of *state* employment discrimination laws, notwithstanding a nearly 150-year-old statutory provision exempting the relevant employment decisions by national banks from state regulation. Indeed, Congress unequivocally provided that national banks can dismiss their officers – who hold positions requiring the highest levels of public trust – "at pleasure." 12 U.S.C. § 24 (Fifth). Congress granted similar authority to federal reserve banks and federal home loan banks to dismiss their employees. *See* 12 U.S.C. § 341 (Fifth); 12 U.S.C. § 1432(a).

Both the Sixth Circuit and the Supreme Court of California have recognized this clear congressional mandate and, in circumstances analogous to this case, have found state laws that place conditions on a bank's dismissal "at pleasure"

power to be preempted. Also, the Fourth Circuit has broadly recognized that the application of state employment laws to federally chartered financial institutions would conflict with their authority to dismiss officers "at pleasure." The Ninth Circuit's decision below – applying state age discrimination laws to national banks – plainly departs from these precedents and creates a clear split of authority with other federal court of appeals and highest state court decisions.

Immediate review by this Court is necessary in this case because the Ninth Circuit's decision will have a profound effect on national banks (as well as federal reserve banks and federal home loan banks) within the nine western States. The effect will be especially pervasive in California where state law employment claims will now be allowed in federal court even though California Supreme Court precedent prohibits them in state court as preempted by federal law.

The ruling below also will create confusion for federal district courts and state courts across the country. Age discrimination laws in the different States vary significantly from each other and from the federal employment discrimination laws. In many instances, States make conduct unlawful that is not unlawful under federal law, *e.g.*, some States prohibit conduct affecting employees younger than those covered by federal law, and different States require different procedures be followed and provide different remedies. The Ninth Circuit, however, adopted a standardless approach by holding that some but not all state employment laws are preempted, without providing an articulable standard for lower courts to discern which laws are preempted and which laws are not.

If left unreviewed by this Court, the Ninth Circuit's ruling will spawn significant, unnecessary, and costly litigation as to the effect of the ruling. Such litigation constitutes precisely the type of burden on national banks that Congress intended to preclude. *Certiorari* should be granted to resolve this important question of federal preemption involving national banks.

STATEMENT OF THE CASE

1. The Statutory And Regulatory Framework

a. Section 8 of the National Bank Act, 12 U.S.C. § 24, broadly delineates the powers of national banks. Among the authority conferred by Congress to a national bank is the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." 12 U.S.C. § 24 (Fifth) (emphasis supplied). Similar language is employed in other federal banking statutes. *See, e.g.*, 12 U.S.C. § 341 (Fifth) (federal reserve banks may "dismiss at pleasure" officers and employees of the bank); 12 U.S.C. § 1432(a) (federal home loan banks may "dismiss at pleasure" officers, employees, attorneys, and agents of the bank).

Section 24 was enacted as part of the National Bank Act when, in 1863 and 1864, Congress created an exclusive and comprehensive federal regulatory regime to charter, supervise, and broadly govern the activities of national banks. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99. The exclusivity of federal regulation under the Act established the supremacy of federal banking law and countered state hostility toward national financial institutions. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003). Indeed, through the National Bank Act, Congress intended that federal law alone would occupy the field of national banking. *See* Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L. Rev. 1133, 1140 (1981).

This congressional enactment of strong federal control over national banking matters built on earlier congressional action that sought to create a national monetary policy, impervious from state interference, through the chartering of the Bank of North America (1781-1785) as well as the First (1791-1811) and Second (1816-1836) Banks of the United States. *Id.* at 1139; Act of Feb. 25, 1791, ch. 10, 1 Stat. 191; Act of April 10, 1816, ch. 44, 3 Stat. 266.

This Court has recognized that Congress thereby established the supremacy of federal authority in the field of national banks from the earliest days following the Nation's founding. The Court has noted that any state regulation of federal banks can undermine and frustrate that goal of Congress to create a stable national currency and monetary policy. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996); *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368-369 (1923); *Easton v. Iowa*, 188 U.S. 220, 229-230 (1903).

b. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) to make it unlawful for an employer to discriminate against individuals who are 40 years in age or older. 29 U.S.C. §§ 623(a), 631(a). Remedies under the ADEA include backpay, lost benefits, and reinstatement. 29 U.S.C. § 626(b).

This Court has assumed in prior decisions that *federal* employment discrimination laws such as the ADEA apply to banks that otherwise maintain their dismissal "at pleasure" authority under federal law over such employees. *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984). The Court has never held or assumed, however, that *state* law overrides a bank's dismissal "at pleasure" power.

c. A Washington state statute makes it unlawful "[t]o refuse to hire any person because of age * * * ," Wash. Rev. Code § 49.60.180(1), "[t]o discharge or bar any person from employment because of age * * * ," *id.* § 49.60.180(2), or "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of age * * * ." *Id.* § 49.60.180(3); *see also id.* § 49.44.090 (making it an unfair employment practice to discriminate against individuals age 40 and older). Individuals may sue employers for violations of these provisions for actual damages, including damages for emotional distress, as well as for attorney's fees. *Id.* § 49.60.030(2); *Bennett v.*

Hardy, 784 P.2d 1258 (Wash. 1990) (cause of action under Wash. Rev. Code § 49.44.090).

2. Factual And Procedural Background

a. Petitioner U.S. Bank National Association (U.S. Bank) is a federally chartered national bank that was formed in accordance with the National Bank Act, 12 U.S.C. § 21.

The board of directors of U.S. Bank elected respondent Kathy Kroske as a U.S. Bank Assistant Vice President in 1993, pursuant to their authority conferred by 12 U.S.C. § 24 (Fifth). App., *infra*, 3a. Respondent later assumed responsibility for U.S. Bank's Manito Branch Office in Spokane, Washington, and became the branch manager. *Ibid.* There, U.S. Bank eventually informed respondent that her branch was not performing adequately and warned her that if her branch continued to underperform she would be disciplined. *Ibid.* Because no improvement occurred, respondent was dismissed from her position in July 2002, in a decision ratified by U.S. Bank's board of directors. *Ibid.* At the time of her dismissal, respondent was fifty-one years old. *Id.* at 4a.

b. Following her dismissal, respondent sued U.S. Bank for age discrimination in Washington State Superior Court under Washington law. App., *infra*, 4a. She claimed that younger bank managers in their twenties and thirties had similar performance-related issues but were given more reasonable opportunities to turn around their branches' performance, and that she was replaced by a less-experienced manager in his mid-twenties. *Ibid.* Respondent alleged "economic and emotional injuries" and sought "[a]ctual damages as defined by Washington discrimination law," as well as attorney's fees. *See* Dist. Ct. Dkt. 1. Respondent did not bring any claim under the ADEA.

U.S. Bank removed the case to federal district court based on diversity of citizenship, 28 U.S.C. § 1332, and

moved for summary judgment on the ground that the state law claim is preempted by Section 8 of the National Bank Act, 12 U.S.C. § 24 (Fifth), which empowers a national bank to dismiss its officers "at pleasure." After U.S. Bank filed for summary judgment, respondent Kroske sought leave to amend her complaint to add claims for federal age discrimination. But, before the district court ruled on either Kroske's motion to amend or U.S. Bank's motion for summary judgment, Kroske abandoned that effort and never added a claim under the ADEA. *See* Dist. Ct. Dkt. 37.

The district court granted U.S. Bank summary judgment and ordered the case dismissed. App., *infra,* 60a. The court held that respondent was an officer of U.S. Bank under the various tests articulate and that, therefore, Section 24 (Fifth) applies to the terms of her employment. *Id.* at 52a-55a. Specifically, the court found that respondent's position "was created by the board of directors," that "she was directly appointed by the board of directors," and that "her termination was ratified in a timely manner by the Board of Directors." *Id.* at 55a. The court found that respondent "held a managerial position and was responsible for many bank operations" and, "as the head of a branch," "constituted a key part of [U.S. Bank's] public image." *Ibid.* The court noted that respondent "d[id] not dispute that she had the express legal authority to bind the bank, and as branch manager, she had decision making authority that related to fundamental banking operations." *Ibid.*

The district court ruled that respondent's state law claims are preempted by the National Bank Act under the reasoning of precedent of the Ninth Circuit and of this Court and under the plain text of the statute. The court explained that the Ninth Circuit, in *Mackey v. Pioneer National Bank*, 867 F.2d 520, [illegible] (1989), already had held that "tort and contract claims arising out of the employment relationship between a national banking association and its officers are completely preempted," and that the Supreme Court's holding that the National Bank Act is designed "to create a uniform and exclusive national law of regulation of national banking associations supports the

notion that the 'at pleasure' language was designed to subject national bank associations to a uniform scheme of federal law." App., *infra*, 56a-57a. The court also pointed to Ninth Circuit rulings that "at pleasure" language in the Federal Home Loan Bank Act and the Federal Reserve Act preempts wrongful discharge claims based on state law. *Id.* at 57a.

The district court rejected respondent's argument that the National Bank Act no longer preempts state law because Congress impliedly repealed the National Bank Act when it enacted the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court noted that U.S. Bank acknowledged that federal employment discrimination law may apply to national banks' dismissal of officers, but that U.S. Bank maintained that those federal statutes do not eliminate the preemptive force of the National Bank Act on state law. The court ruled that the ADEA and Title VII "cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would upend the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches." App., *infra*, 60a.

Finally, the district court dismissed an argument by Kroske that, under the California Supreme Court's ruling in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), state employment discrimination claims are not preempted because claims under Title VII and the ADEA survive Section 24 (Fifth). App., *infra*, 59a-60a n.3. The district court explained that "[i]n *Peatros*, * * * the majority of justices (the main opinion and the concurring opinion) rejected the notion that the National Bank Act was impliedly amended by Title VII and ADEA, as to open the window for state antidiscrimination laws." *Ibid.*

c. The Ninth Circuit reversed on the preemption issue. App., *infra*, 26a-49a. As a threshold matter, the court affirmed that the amount in controversy meets the requirements for federal court diversity jurisdiction. *Id.* at 29a-31a. The court also noted that Kroske no longer claimed that she was not a bank officer. *Id.* at 31a.

Turning to the preemption issue, the court began from a starting point that presumed, in respondent's favor, that the National Bank Act does not preempt state employment discrimination law. App., *infra*, 33a-34a. Although the court purported to acknowledge that a presumption against preemption "does not apply * * * 'when the State regulates in an area where there has been a history of significant federal presence,'" and "that there is a significant federal presence in the regulation of national banks," the court of appeals nonetheless rejected that doctrine in this case. *Id.* at 33a. The only reason noted by the court for doing so was the fact that the state law here "was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds." *Ibid.*

Under the court's misguided presumption against preemption, the court proceeded to hold that the National Bank Act does not preempt the field of state "law governing national banks' employment practices" because federal substantive authority over national banks is not exclusive. *Id.* at 35a. The court reasoned that state law is "modeled after and incorporated into the federal anti-discrimination laws" and the federal laws conflict with the National Bank Act's dismissal provision. *Id.* at 41a. Then, rather than merely giving effect to the ADEA by reconciling it to the extent possible with the National Bank Act, the court of appeals concluded that the National Bank Act had been repealed by implication to the extent necessary to give effect to the ADEA and, in a leap of reasoning, concluded that it must also be repealed to the extent necessary to give effect to the Washington state law which, in the court's view, "mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." *Id.* at 45a. The court went on to note that "parallel state antidiscrimination laws are explicitly made part of the enforcement scheme for the federal laws," App., *infra*, 46a, and to conclude that the state law employment discrimination provisions, "at least insofar as they are consistent with the prohibited grounds for termination under the ADEA" are not preempted. *Id.* at 49a.

In its initial opinion, the Ninth Circuit also indicated that the California Supreme Court had adopted a "similar

conclusion" in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000). App., *infra*, 45a-46a n.6. But that statement misconstrued *Peatros* because only three of the seven Justices on the California Supreme Court joined the opinion cited by the Ninth Circuit, and a majority of the *Peatros* court joined in the other opinions in that case which concluded that California's employment discrimination laws are preempted by the National Bank Act.

The Ninth Circuit denied panel rehearing, but excised the erroneous characterization of the *Peatros* case. The court issued an amended opinion that omits any reference to *Peatros* without any recognition that the Ninth Circuit's opinion here is contrary to that binding precedent of the California Supreme Court.[1] App., *infra*, 2a. The court of appeals denied rehearing *en banc*. *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision below significantly undermines the effectiveness of the National Bank Act, which was designed to create a national banking system subject to uniform federal law and to maintain the stability and strength of that system by shielding it from state regulation. Review is necessary to avoid the application of a patchwork of state laws and to resolve the conflict between the Ninth Circuit ruling below and the decisions of the Sixth Circuit and the California Supreme Court.

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[1] A legal proposition supported by four or more Justices of the California Supreme Court is recognized as the holding of that court. *Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 948, 948 (Cal. 1914) (per curiam) ("[A]ny proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices. The concurring opinion herein is the only one that is agreed to by the necessary number."). Accordingly, the Courts of Appeal in California recognize the opinions of Justices Kennard and Brown in *Peatros* as the holding of the California Supreme Court on this issue. *See Pereira v. Bank of America, N.T. & S.A.*, No. H021997, 2002 WL 221984, at *2-*3 (Cal. App. Feb. 13, 2002) (nonpublished opinion) (recognizing the opinions of Justices Kennard and Brown as the controlling holding of the court).

The Ninth Circuit's ruling subjects the dismissal of national bank officers to divergent state-by-state employment discrimination laws, contrary to the statutory purpose and to the express text of the National Bank Act, 12 U.S.C. § 24 (Fifth). Section 24 (Fifth) explicitly vests national banks with the "power" to dismiss "at pleasure" their bank "officers." The federal reserve banks and the federal home loan banks also are vested with dismissal "at pleasure" authority over their employees.

It is federal employment discrimination law, such as the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, and not state law, that applies to dismissal of national bank officers. Respondent chose not to bring a claim under the ADEA, however, and that choice does not allow her to nonetheless pursue a state law suit on such a claim.

The Sixth Circuit and the Supreme Court of California have both correctly recognized that state employment discrimination laws are preempted by federal statutory authority of banking entities to dismiss employees "at pleasure." The court of appeals below parted ways with those courts because it misapplied well-settled principles of federal preemption and canons of statutory construction.

The Ninth Circuit erroneously applied an implied repeal analysis to find a purportedly irreconcilable conflict between the federal ADEA and the National Bank Act and then combined that with a presumption against preemption, despite the fact that such a presumption does not apply under the National Bank Act. The Ninth Circuit ignored this Court's holding in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), that the powers of national banks enumerated pursuant to Section 24 are "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32.

The Ninth Circuit's decision swings the pendulum substantially away from this Court's rationale in *Barnett Bank*, which strongly favors preemption of state laws by federal national banking laws. The court of appeals' ruling, if allowed to stand, places a host of federally chartered

banks in jeopardy of being encumbered by widely varying state law, contrary to the national banking framework established by Congress, and undermines the fundamental federal character of national banks.

I. THE COURTS OF APPEALS AND STATE COURTS ARE IN CONFLICT AS TO WHETHER A CONGRESSIONAL GRANT OF POWER TO DISMISS "AT PLEASURE" CERTAIN EMPLOYEES OF FEDERALLY CHARTERED BANKS PREEMPTS STATE EMPLOYMENT LAW

The lower courts are divided on the question presented and this Court's review is warranted to ensure that national banks in different jurisdictions are not subject to divergent legal standards.

A. The Sixth Circuit And The California Supreme Court Have Squarely Held That Federal Statutory Authority To Dismiss Certain Banking Employees "At Pleasure" Preempts State Employment Discrimination Laws, In Direct Conflict With The Ruling Below

The Sixth Circuit and the California Supreme Court have unequivocally concluded that *all* state laws seeking to regulate the dismissal of certain bank employees are preempted where a bank exercises its federal statutory power to dismiss the particular employees "at pleasure." These courts correctly recognize that state laws which impose conditions on the dismissal of employees directly conflict with the plain language of federal statutes, such as Section 24 (Fifth), which grant the "at pleasure" dismissal authority. These holdings thereby protect the congressional purpose underlying the National Bank Act – the supremacy of federal banking powers – by ensuring that the dismissal of national bank officers – *i.e.*, those who hold positions requiring the highest levels of public trust, integrity, and confidence – remains free from state intrusion and

regulation, and that uniform federal banking laws, not the divergent laws of particular jurisdictions, apply to the dismissal of national bank officers.

1. The Sixth Circuit first addressed the issue presented by this case almost 20 years ago in *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 929-930 (6th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987). The court there reviewed a claim by a federal reserve bank employee that she had been dismissed due to her race, national origin, and a job-related disability. The court noted that the allegations were plainly cognizable under federal law, *i.e.*, Title VII, but held that her claims raised pursuant to Michigan law were preempted by the dismissal "at pleasure" provision of the Federal Reserve Act. The court held that "Section 4, Fifth, of the Federal Reserve Act, 12 U.S.C. § 341, Fifth, specifically provides that employees of a federal reserve bank may be dismissed 'at pleasure.' This provision preempts any state-created employment right to the contrary." *Id.* at 931.

The Sixth Circuit recently reaffirmed that longstanding precedent in *Arrow v. Federal Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), where a former federal reserve bank employee alleged "that the Bank had engaged in gender and disability discrimination * * * ." *Id.* at 393. The court again concluded that the language of the dismissal "at pleasure" provision of the Federal Reserve Act "applies to preempt state employment rights." *Ibid.* The Sixth Circuit found support in other appellate interpretations of the dismissal "at pleasure" language to establish that Congress intended to preempt state law. *Id.* at 394 (citing *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 387 (6th Cir. 1983) (construing 12 U.S.C. § 24 (Fifth)); *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (construing 12 U.S.C. § 1432(a)); and *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) (construing 12 U.S.C. § 341 (Fifth)).

2. The California Supreme Court reached the same conclusion in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), where it addressed the claims of a former national bank vice president who alleged that she had

been terminated on the basis of her race and age in violation of California's employment discrimination laws. The court ultimately allowed the plaintiff's claims to proceed under fractured reasoning set forth in multiple opinions (on grounds not relevant here), but on the critical question of whether state law employment discrimination claims by national bank officers are preempted by Section 24 (Fifth), a majority of the court plainly held that they are preempted by the National Bank Act. *See id.* at 559 n.1 (Kennard, J., concurring and dissenting) (agreeing with Justice Brown); *id.* at 559-563 (Brown, J., dissenting for three Justices). The views reflected in the opinions of Justices Kennard and Brown constitute the holding of the California Supreme Court on this issue. *See* note 1, *supra*.

Neither the rulings of the Sixth Circuit nor of the California Supreme Court can be reconciled with that of the Ninth Circuit below.

B. The Ninth Circuit Ruling Below Finds No Support In Other Appellate Case Law

1. The Fourth Circuit has issued an opinion involving a state wrongful termination law that is in significant tension with the Ninth Circuit's ruling in this case, although that court has not addressed the precise question of the preemptive effect of the federal dismissal "at pleasure" provision on state employment discrimination law.

In *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993), the Fourth Circuit cited with approval the Sixth Circuit's decision in *Leon* discussed above. The court held that all state law wrongful termination actions are preempted under the dismissal "at pleasure" provision of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a). The court emphasized that "Congress intended for *federal* law to define the discretion which the Bank may exercise in the discharge of employees." *Id.* at 220 (emphasis supplied). The Fourth Circuit broadly recognized that only a federal law can apply to the dismissal "at pleasure" language, and that that provision cannot be limited by state law.

2. Only one other appellate decision has held that a state employment discrimination law is not preempted when examining a federal dismissal "at pleasure" provision, but that ruling – from an intermediate state appellate court from Ohio – does not apply the rationale of the Ninth Circuit. Instead, the Ohio intermediate court extends its non-preemption ruling far beyond what the Ninth Circuit apparently would support and declined to find *any* preemption. In *White v. Federal Reserve Bank*, 660 N.E.2d 493 (Ohio Ct. App. 1995), the Ohio court of appeals resolved a case brought by a federal reserve bank employee who alleged that he was discriminated on the basis of his disability in violation of Ohio state law. Like the Ninth Circuit, the Ohio court applied a presumption against preemption, and concluded that nothing in the language of the dismissal "at pleasure" provision or legislative history of the Federal Reserve Act evinced an intent of Congress to preempt state law. *Id.* at 494-496. According to the Ohio court, the dismissal "at pleasure" language was aimed only at imposing at-will employment, which could be modified by subsequent law. *Id.* at 496.

This Ohio decision ignores two centuries of judicial rulings concerning the purpose and intent behind the Nation's federal banking system, and leaves open the possibility that *any* state employment law can apply to national banks, federal reserve banks, and federal home loan banks. *Ibid.*

C. The Disagreement In The Lower Courts Undermines Congress's Longstanding Framework Of Uniform Regulation Of National Banks And Will Lead To Anomalous Results

1. The Ninth Circuit's ruling frustrates the purpose of the National Bank Act

The ruling below undermines the purpose of the National Bank Act to create a uniform national banking system, free from state interference, so that any attempt to impose state law requirements upon a national bank's most vital positions of trust, its officers, is void. *See Peatros*, 990

P.2d at 561 (Brown, J., dissenting) ("'National banks are instrumentalities of the Federal government, created for a public purpose[.] * * * [A]n attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and * * * frustrates the purpose of the national legislation * * * .'") (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). "'These principles are axiomatic' to the nature of a national banking system." *Ibid.*; *see also id.* at 559 n.1 (Kennard, J., concurring and dissenting) ("[T]he act fully preempts a state law * * * action. For in that situation the state law claim conflicts with the objectives of the National Bank Act."); *see also Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Barnett Bank of Marion County*, 517 U.S. at 32.

The Ninth Circuit ruling also undermines the preemptive strength of the National Bank Act because it applies a misguided implied repeal analysis that expands the impact that later enacted federal statutes may have on the National Bank Act. Under the Ninth Circuit reasoning, later enacted federal statutes such as the ADEA are not merely reconciled with the National Bank Act by being interpreted to override prior inconsistent provisions of the Act (such as the ADEA applying to dismissal of national bank officers notwithstanding the "at pleasure" provision of the Act). According to the Ninth Circuit, Congress's later enactment of such a federal statute will now also give *state* statutes the same force to override the National Bank Act.

The California Supreme Court correctly and directly rejected this type of reverse preemption analysis in the guise of an implied repeal analysis. Then-Justice Brown on the California Supreme Court explained that, "[a]bsent a clear expression" of congressional intent, "amendment or repeal of one federal statute by another should not be read as an invitation to append analogous *state* laws to the national scheme," *Peatros*, 990 P.2d at 562 (Brown, J., dissenting) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (emphasis added)).

And there is an obvious difference in the consequences that flow from a federal employment discrimination statute being reconciled with the National Bank Act, as opposed to a state law trumping a federal banking statute. The supremacy of federal law established by the National Bank Act is not disturbed by the uniform application of *federal* employment discrimination laws throughout the country, but is significantly disturbed by the application of *state* laws, *ibid*, especially divergent state laws which exacerbate this problem.

The Ninth Circuit's reliance on *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 101 (1983), is misplaced. *Shaw* does not provide support for the court of appeals' implied repeal analysis. *Shaw* resolved the issue of the correct interpretation of the *savings clause* in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq. Peatros*, 990 P.2d at 559 (Kennard, J., concurring and dissenting). ERISA's savings clause, unlike the National Bank Act, broadly preserves all other potentially conflicting federal law in its entirety, so that ERISA "shall not 'be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.'" *Shaw*, 463 U.S. at 101. Thus, in *Shaw* the question was whether Title VII might be at all "impair[ed]" if ERISA were interpreted to preempt state employment discrimination laws. This Court concluded that, because Title VII can rely upon state agencies for screening and investigative purposes, the preemption of all state laws would "modify" and "impair" the operation of Title VII in violation of ERISA's savings clause which limits ERISA's preemptive force. Here, however, "the National Bank Act * * * contains no similar self-imposed limitation on its preemptive force, a crucial distinction * * *. Because the National Bank Act does not limit its preemptive effect, there is no basis for adopting a partial preemption analysis * * *." *Peatros*, 990 P.2d at 559 (Kennard, J., concurring and dissenting).[2]

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[2] It is no answer for Kroske to rely upon the state law deferral provisions of the ADEA (cited by the Ninth Circuit) as a justification

(Continued on following page)

2. The Ninth Circuit's ruling means that national bank officers in California can bring employment discrimination claims under state law in federal court, but not in state court

The Ninth Circuit's decision will have particularly anomalous results within California. Under the California Supreme Court's decision in *Peatros*, a state court must dismiss as preempted any employment discrimination claim brought by a national bank officer under state law alleging an unlawful dismissal. But under the Ninth Circuit's holding in the instant case, that bank officer can bring that very same preempted state law claim in federal court.

The Ninth Circuit is directly at odds with the California Supreme Court over whether a state cause of action exists for officers of national banks to challenge their dismissal. The highest state court forbids such claims to be adjudicated in state trial courts, but the Ninth Circuit now allows them to be decided in federal district court. No good can come of this conflict. This federal-state intrastate split will unquestionably lead to substantial forum shopping, as plaintiffs are in the odd circumstance of needing to manufacture federal jurisdiction to preserve their state law claims.

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against preemption. Employees are required to exhaust administrative remedies with the Equal Employment Opportunity Commission (EEOC) or equivalent state agency before filing a suit for violation of the ADEA. 29 U.S.C. §§ 626(d), 633(b). Notwithstanding the ADEA's use of state administrative agencies for exhaustion purposes, however, the ADEA explicitly left state law where it stood prior to the enactment of the ADEA. The ADEA does not confer jurisdiction under state employment discrimination laws or on state agencies that enforce them. The ADEA specifies that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age." 29 U.S.C. § 633(a). Accordingly, if a State provides a remedy, a plaintiff first seeks recourse under state law, 29 U.S.C. § 633(b), but otherwise seeks immediate relief by filing a charge with a federal agency. 29 U.S.C. § 626.

3. The Ninth Circuit's ruling will create confusion for national banks and spawn litigation regarding the scope of the Ninth Circuit's standardless preemption test

The Ninth Circuit's decision creates substantial uncertainty, especially for national banks within the nine States of the Ninth Circuit. Further percolation in the lower courts will not resolve or clarify the issues.

The question of whether state law is preempted by the dismissal "at pleasure" authority of a federal bank has been thoroughly examined by the Sixth Circuit, the Ninth Circuit, and the California Supreme Court. The preemption question presented in the instant dispute will require the inevitable resolution by this Court, and delay now will only subject national banks to the substantial costs associated with uncertain state-by-state regulation in the interim, in direct contravention of Congress's intent.

The Ninth Circuit erroneously appears to view its ruling to be one that would have limited effect because the court indicated that the Washington state age discrimination law under which respondent brought her state law claim "mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." App., *infra*, 21a. But the Ninth Circuit provided no guidance to lower courts as to what it meant by that overbroad declaration.

For example, in an earlier section of its opinion where it upheld the finding of the required amount-in-controversy for federal diversity jurisdiction, the Ninth Circuit relied in part on the amount of emotional distress damages that respondent might be able to recover if she were to prevail on the merits of her state law claim. App., *infra*, 6a (emotional distress damages available pursuant to Washington law). But emotional distress damages are not available under the ADEA. *Commissioner v. Schleier*, 515 U.S. 323, 326 (1995) ("[T]he Courts of Appeals have unanimously held * * * that the ADEA does not permit * * * compensatory damages for pain and suffering or emotional distress."). Although federal jurisdiction exists in this case based on the amount-in-controversy being met

by the attorney's fees sought by respondent (which are available under both state and federal law), the Ninth Circuit chose to rely for its amount-in-controversy ruling on the exclusive state law remedy of emotional distress damages rather than attorney's fees. App., *infra*, 6a. But the court of appeals did not make clear how its view of the Washington state law as mirroring the "substantive provisions" of and being interpreted consistently with the ADEA affects such inconsistent state law remedies. Respondent also failed to exhaust administrative remedies, which would be required under the ADEA, because Washington law requires no exhaustion. Wash. Rev. Code § 49.60.030(2).

Thus, in this very case, continued litigation will be required over the scope of the preemption rule created by the Ninth Circuit. Should Kroske's state law claims go forward on remand, the district court will be required to determine whether the ADEA's limitations on recoverable damages and its administrative exhaustion requirements are "substantive provisions" of the ADEA that are somehow mirrored by state law (so that they are not preempted) or, if they are not, whether they are then preempted by the National Bank Act.

Moreover, all States within the territorial jurisdiction of the Ninth Circuit have laws that could be said to mirror, to some degree, substantive provisions of the ADEA because they preclude discrimination against individuals on the basis of age. But, on another level, the state laws diverge radically from each other and from the ADEA on a number of provisions which may or may not be "substantive" under the Ninth Circuit's holding. Accordingly, the Ninth Circuit ruling will also cause significant litigation in future cases in other States within the jurisdiction over the collateral issue of what aspects of state law can apply to national banks under the Ninth Circuit's flawed analysis.

For example, whereas the federal ADEA makes discrimination on the basis of age unlawful only against employees age 40 and older, Oregon makes such conduct unlawful against employees as young as age 18, Or. Rev.

Stat. § 659A.030, and Alaska, Hawaii and Montana have no apparent age-minimum for employees to bring age discrimination claims. *See* Alaska Stat. § 18.80.200(b); Haw. Rev. Stat. § 378; Mont. Code Ann. § 49-2-101. Also, the ADEA makes it unlawful only for employers who have 20 or more employees to engage in such conduct. By contrast, every State within the Ninth Circuit makes it unlawful for employers with *less* than 20 employees to violate the state's statutory prohibition. *See* Alaska Stat. § 18.80.300(4); Ariz. Stat. § 41-1461(4); Cal. Gov. Code § 12926(d); Haw. Rev. Stat. § 378-1; Idaho Code § 67-5902; Mont. Code Ann. § 49-2-101(11); Nev. Rev. Stat. § 613.310(2); Or. Rev. Stat. § 659A.001; Wash. Rev. Code § 49.60.040(3).

The Ninth Circuit's decision thus creates confusion as to what to do about state law procedures and remedies that are different from those under the ADEA. Unlike the ADEA, Alaska, Oregon and Washington require no exhaustion of administrative remedies prior to the filing of a complaint. *See* Alaska Stat. § 18.80.145(a); Or. Rev. Stat. § 659A.870(2); Wash. Rev. Code § 49.60.030(2). And a number of jurisdictions provide for more expansive remedies for violations of state law (in some circumstances including punitive damages) that are not allowed under the ADEA. *See* Haw. Rev. Stat. § 368-17(a); Idaho Code § 67-5908; *A.L.P. Inc. v. Bureau of Labor & Indus.*, 984 P.2d 883 (Or. App. 1999); *Blaney v. International Ass'n of Machinists & Aerospace Workers*, 87 P.3d 757 (Wash. 2004).

These concerns about extended litigation over the scope of the Ninth Circuit's ruling are by no means inchoate. Indeed, significant confusion already exists amongst the district courts as to the preemptive scope of Section 24 (Fifth) and the other dismissal "at pleasure" provisions. The court of appeals' decision in this case will only further that legal turmoil, because it will require extended litigation to determine not only whether state law is preempted but also as to what extent. Already a number of courts have declined to find preemption of state

employment laws by the statutes that authorize a federally chartered bank to dismiss certain employees "at pleasure." *See Moodie v. Federal Reserve Bank of N.Y.*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993); *Moodie v. Federal Reserve Bank of N.Y.*, 831 F. Supp. 333 (S.D.N.Y. 1993); *Mueller v. First Nat'l Bank of the Quad Cities*, 797 F. Supp. 656 (C.D. Ill. 1992); *Booth v. Old Nat'l Bank*, 900 F. Supp. 836, 843 (N.D. W. Va. 1995). But other district courts have reached the opposite conclusion. *See Evans v. Federal Reserve Bank of Phila.*, No. Civ.A. 03-4975, 2004 WL 1535772, at *5 (E.D. Pa. July 8, 2004); *Sheehan v. Anderson*, No. 98-5516, 2000 WL 288116 (E.D. Pa. Mar. 17, 2000), *aff'd*, 263 F.3d 159 (3d Cir. 2001); *Kispert v. Federal Home Loan Bank of Cincinnati*, 778 F. Supp. 950, 952-953 (S.D. Ohio 1991); *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp. 95, 97 (S.D.N.Y. 1989).

Absent review by this Court, these inconsistent decisions will continue to arise in district courts at great costs to national banks and other federally chartered banks, and cause further confusion as to which aspects of state law apply. Courts will expend unnecessarily their limited resources parsing various state employment discrimination law provisions to discern the minutia of their substantive nature (or not) and their consistency (or not) with the ADEA to decide whether, and to what extent, those state laws apply to national banks under the Ninth Circuit's ruling here. These lower courts will not be analyzing the question presented here and thus will be providing no new analysis to the already extensively vetted and much broader threshold preemption question. Of course, the burden and costs of litigation as these collateral issues are addressed will be imposed on national banks (and their customers) in suits that should not be allowed to proceed in the first place because, in fact, all application of state employment law to the dismissal of national bank officers is preempted by the dismissal "at pleasure" power conferred on national banks by Congress.

D. The Court Should Grant Review To Bring The Ninth Circuit In Line With The Plain Language Of The National Bank Act

1. The Constitution designates the "Laws of the United States" as the "Supreme Law of the Land." U.S. Const. art. VI. Whether a federal statute or regulation preempts state law pursuant to the Supremacy Clause "fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Congress can demonstrate its intent to preempt state law through explicit statutory language, by occupying a given field to leave no room for the States to supplement it, or by a federal statute that conflicts with a state statute or regulation. *Barnett Bank of Marion County*, 517 U.S. at 31; *English*, 496 U.S. at 79. Specifically, the latter preemption rationale applies "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (internal citation omitted, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Barnett Bank of Marion County*, 517 U.S. at 31 (same).[3]

Section 24 (Fifth) empowers a national bank to dismiss its officers at pleasure, *e.g.*, without constraint of state law, and thus that imposition of state employment discrimination law conflicts with that federal statutory authority. In addition, state employment discrimination law "stands as an obstacle" to the accomplishment of the purposes of the National Bank Act to preserve the uniformity of the national banking system, to protect the financial security and integrity of national banks from unscrupulous or incompetent officers holding positions of

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[3] This Court has held that field and conflict preemption are not "rigidly distinct." *English*, 496 U.S. at 79 n.5. "[F]ield pre-emption may be understood as a species of conflict pre-emption * * * ." *Id.* at 79-80 n.5.

public trust, *see Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896), and, more generally, to insulate national banks from state interference and regulation. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Talbott v. Board of County Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891).

The Ninth Circuit ignored these well-settled preemption principles. Rather than rely upon the obvious conflict between state and federal law, as well as the attendant frustration of the very purpose behind the nearly 150 year-old National Bank Act, the Ninth Circuit, instead, characterized the ADEA as impliedly repealing the National Bank Act and then leapt to the conclusion that that meant that *state* employment discrimination law also trumps the National Bank Act, and thus does not conflict.

But this *ipse dixit* analysis – that because a later enacted *federal* employment discrimination law overrides Section 24 (Fifth), then corresponding *state* law also does – overlooks the fact that congressional purpose is paramount to any implied repeal analysis. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The ADEA was plainly designed to give a federal remedy for age discrimination because States had failed to rectify such discrimination. The National Bank Act, as noted above, was enacted, for among other reasons, to create a uniform system of national banking and to shield national banks from state laws that could be applied in a hostile manner. There is no conflict between these statutory goals because the application of a uniform federal employment discrimination law to national banks is consistent with the National Bank Act's purpose. Application of state employment discrimination laws, however, particularly where they are divergent, frustrates that purpose.

2. In any event, even were an implied repeal analysis called for, the Ninth Circuit got that analysis wrong on its own terms. As this Court has admonished, implicit repeals of conflicting federal statutes occur "only if

necessary" to make the later-enacted statute "work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 342, 357 (1963). As noted above, the ADEA plainly contemplates its effective operation in the *absence* of State law. *See* 29 U.S.C. § 633(a) (creating no jurisdiction for state law); 29 U.S.C. § 626 (authorizing employees to file claims with the EEOC); 29 U.S.C. § 633(b) (requiring deferral only where State law exists). Accordingly, application of *only* federal employment discrimination law to national banks would enable the ADEA to "work" without "[un]necessar[ily]" undermining the National Bank Act and its goals of uniformity and the prevention of state regulation. *Silver*, 373 U.S. at 357.

Thus, the ruling below strikes at the very heart and purpose underlying the National Bank Act. Left unreviewed, national banks within the Ninth Circuit will now be required to comply with divergent standards of state employment discrimination laws and procedures, will see an attendant increase in the costs of complying with the peculiarities of multiple jurisdictions rather than a single national standard, and may be compelled to pay administrative penalties, fines, and money damages not contemplated by federal law, all of which will undermine the safety and soundness of national banks.

II. THE NINTH CIRCUIT'S APPLICATION OF A PRESUMPTION AGAINST PREEMPTION IGNORED THE CONGRESSIONAL INTENT TO PREEMPT STATE REGULATION OF NATIONAL BANKS DATING BACK TO THE FOUNDING, IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT

A. Even though the Ninth Circuit acknowledged the long history behind the uniform, national banking system, it still applied a presumption against the preemption of state law. The court did so based on its observation that the state employment discrimination law was enacted pursuant to Washington's police powers. App., *infra*, 9a.

But the court of appeals ignored the fact that a presumption against preemption does *not* apply, even to historic police powers, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The issue thus turns on whether "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Ibid.*

This Court has answered that question in the affirmative for the National Bank Act. In *Barnett Bank of Marion County, N.A. v. Nelson*, this Court addressed the issue of whether an enumerated power granting national banks in small towns the authority to sell insurance preempted a Florida state law prohibiting the very same conduct. 517 U.S. 25 (1996). In deciding this issue, the Court recognized, from a historical standpoint, that powers conferred pursuant to Section 24 are "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County*, 517 U.S. at 32. Rather than assume that state law survives preemption, as a presumption against preemption does, this Court requires, in essence, a contrary presumption in the context of the National Bank Act: "In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33.

B. Both the Second and Sixth Circuits have held correctly that a presumption against preemption does not apply in cases involving the regulation of federally chartered banks.

The Second Circuit in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *pet. for cert. pending*, No. 05-431 (Oct. 4, 2005), noted that "[t]here is typically a presumption against preemption in areas of regulation that are traditionally allocated to states and are of particular local concern." *Id.* at 314. "'The presumption against federal preemption disappears, however, in fields

of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.'" *Ibid.* (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)).

In *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), the Sixth Circuit reached the same conclusion. It held that the field of banking is so occupied by federal law that a presumption against preemption cannot apply. *Id.* at 560 n.3.

C. Significantly, because a presumption against preemption unquestionably places a greater burden upon the party seeking to invalidate state law, it often is outcome determinative. The Ninth Circuit's decision, by applying a presumption in a field with a substantial federal presence since the founding of the nation, thus threatens numerous other banking laws and regulations with interference from state law, by now requiring a finding of greater congressional intent to preempt state law.

This Court should resolve this conflict of authorities between the Ninth Circuit and the Second and Sixth Circuits, and rectify the Ninth Circuit's divergence from this Court's precedent.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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JUNE 13, 2006

432 F.3d 976

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathy Kroske, an individual, *Plaintiff-Appellant,* *v.* US Bank Corp., a foreign corporation; dba US Bank *Defendants-Appellees.*	No. 04-35187 D.C. No. CV-02-00439-RHW ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 15, 2005 – Seattle, Washington

Filed December 23, 2005
Amended February 13, 2006

Before: A. Wallace Tashima, Richard A. Paez, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Paez

COUNSEL

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Thomas Bassett & Angel Rains, Lukins & Annis P.S., Spokane, Washington, for the defendant-appellant.

ORDER

The opinion filed December 23, 2005 is amended as follows:

1. Footnote six is deleted in its entirety.

2. The first sentence of Part I ("Background") is deleted in its entirety and replaced with the following sentence: "U.S. Bank Corp., a Delaware corporation, owns U.S. Bank National Association, which is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21."

With these amendments, Appellees' petition for panel rehearing is DENIED.

The full court has been advised of Appellees' petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore the petition for rehearing en banc is DENIED.

No further petitions for panel rehearing or rehearing en banc shall be filed.

OPINION

PAEZ, Circuit Judge.

Kathy Kroske appeals the district court's order granting Defendant U.S. Bank Corp.'s motion for summary judgment, dismissing Kroske's age discrimination claim under the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400. Kroske first contends that the district court erroneously concluded that

the amount in controversy exceeded $75,000 and therefore improperly determined that it had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Kroske further argues that the district court erroneously concluded that the National Bank Act, 12 U.S.C. §§ 21-216d, preempts her age discrimination claim under the WLAD. We have jurisdiction under 28 U.S.C. § 1291. We conclude that diversity jurisdiction is proper and that Kroske's age discrimination claim under the WLAD was not preempted. Accordingly, we reverse and remand.

I. Background

U.S. Bank Corp., a Delaware corporation, owns U.S. Bank National Association, which is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21. The Bank is governed by a board of directors, which is empowered by the Bank's bylaws to elect and discharge officers.

Kathy Kroske began working for the Bank in 1977 as a teller. On April 20, 1993, the Bank's board of directors elected Kroske as an officer in the role of Assistant Vice President. During restructuring due to a merger, the Bank changed Kroske's position from retail market manager to manager of the Manito bank branch in Spokane, Washington. As manager, Kroske was notified that her branch was not meeting the Bank's goals and quotas for business activity. Although Kroske contends that her branch was the smallest in the area with the fewest employees, and that she was short-staffed, the Bank continued to insist that her branch meet fixed business activity levels and warned that she would be disciplined if it did not. Ultimately, in July 2002, the Bank terminated Kroske for

allegedly failing to meet the daily performance goals. The board of directors subsequently ratified Kroske's termination in a meeting convened in Minneapolis, Minnesota.

Kroske filed suit in Washington State Superior Court against the Bank. She alleged that at the time of her termination, the other branch managers in the region were in their twenties and thirties, while Kroske was fifty-one years old. Further, the Bank allegedly gave these younger managers a reasonable opportunity to meet the business activity goals and denied Kroske such an opportunity. In addition, Kroske contended that she was replaced by an employee who was in his mid-twenties and possessed less experience than Kroske. Kroske therefore alleged that the Bank had terminated her on the basis of her age in violation of the WLAD, and sought damages, as well as attorney's fees and costs. In her complaint, Kroske did not allege any federal causes of action.

The Bank removed the case to federal court and, once in federal court, filed a motion for summary judgment arguing that Kroske's state discrimination claim was preempted by the National Bank Act, specifically 12 U.S.C. § 24(Fifth), which grants national banks the power to dismiss officers "at pleasure." Kroske opposed the motion, contending that she was not an officer under § 24(Fifth) and, in the alternative, that the National Bank Act did not preempt her age discrimination claim under the WLAD.

The district court granted the Bank's motion for summary judgment. The court held that Kroske qualified as an "officer" under the National Bank Act. Further, the district court concluded that § 24(Fifth) preempts the field of law regulating the Bank's employment practices and

therefore preempted Kroske's age discrimination claim under the WLAD. Kroske timely appealed, challenging the district court's jurisdiction and the grant of summary judgment.

II. Amount In Controversy

Kroske first contends that removal of her case to federal court was improper because the district court lacked diversity jurisdiction under 28 U.S.C. § 1332.[1] She argues that the Bank did not meet its burden of establishing that the amount in controversy exceeded $75,000. "We review de novo a district court's determination that diversity jurisdiction exists." *Breitman v. May Co. Cal.*, 37 F.3d 562, 563 (9th Cir. 1994). The factual determinations necessary to establish diversity jurisdiction are reviewed for clear error. *Co-Efficient Energy Sys. v. CSL Indus., Inc.*, 812 F.2d 556, 557 (9th Cir. 1987).

Where, as here, "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount in controversy exceeds $[75],000." *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002). The amount in controversy includes the amount of damages in dispute, as well as attorney's fees, if authorized by statute or contract. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). When the amount is not

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[1] 28 U.S.C. § 1332(a)(1) provides, in relevant part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

"facially apparent" from the complaint, "the court may consider facts in the removal petition, and may 'require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Singer*, 116 F.3d at 377 (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).

Here, Kroske's complaint alleged that "she suffered and continues to suffer economic and emotion [sic] injuries and other damages, with specific amounts to be proven at the time of trial." In response to the Bank's interrogatories, Kroske further identified the following categories of damages: lost wages, benefits including but not limited to health and mental insurance, 401(k) contributions, value of life insurance policies, stock options, and emotional distress damages, as well as attorney's fees and costs. Kroske did not, however, allege the amount of damages or fees she sought.

In determining the amount in controversy, the district court properly considered Kroske's interrogatory answers and emotional distress damage awards in similar age discrimination cases in Washington. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). Based upon a preponderance of the evidence, the court concluded that Kroske's lost wages amounted to at least $55,000, that her 401(k) contribution amounted to at least $1000, and that her emotional distress damages would add at least an additional $25,000 to her claim. Therefore, even without including a potential award of attorney's fees, the district court found that the amount in controversy exceeded $75,000. This finding was not clearly erroneous; diversity jurisdiction properly exists in this case.

III. Preemption

Kroske contends that the district court erred in concluding that her age discrimination claim under the WLAD, Wash. Rev. Code § 49.60.180, was preempted by the National Bank Act. The National Bank Act provides that a national bank shall have the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." 12 U.S.C. § 24(Fifth) (emphasis added). Kroske concedes that she was appointed and terminated by the board of directors and does not challenge the district court's determination that she was an "officer" under 12 U.S.C. § 24(Fifth). Kroske contends, however, that the district court erred in determining that her state law age discrimination claim is preempted by the dismiss-at-pleasure provision of § 24(Fifth). We agree.

"We review a district court's grant of summary judgment de novo." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003). Further, federal preemption is an issue of law, which we review de novo. *Id.*

A.

Under Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, it is axiomatic "that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d

407 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)).

Federal law may preempt state law under the Supremacy Clause in three ways. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). First, Congress may state its intent through an express preemption statutory provision. *Id.* at 78-79. Second, "in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79.

> Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law that actually conflicts with federal law is preempted. *Id.* "Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citation and quotation omitted). In considering whether any of these three categories of preemption apply, however, "'[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone*, 505 U.S. at 516 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Further, "[w]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n. 8 (1997) (internal quotations omitted); *Rice*, 331 U.S. at 230. The presumption of non-preemption does not apply, however, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Here, although we recognize that there is a significant federal presence in the regulation of national banks, *see Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002), WLAD was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds. *See* Wash. Rev. Code § 49.60.010. Thus, we begin with the presumption that Congress did not intend the National Bank Act to preempt the WLAD. *Cf. PG & E Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003) (holding that presumption against preemption of generally applicable state law applies in bankruptcy area); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328-29 (11th Cir. 2001) ("Although the federal government through the ICCTA has legislated in an area where there has been a history of significant federal presence, . . . West Palm Beach is acting under the traditionally local police power of zoning and health and safety regulation." (footnote, citation and quotation omitted)).

B.

The at-pleasure provision of § 24(Fifth) is part of the scheme of federal laws governing the duties and powers of federally chartered banks. "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), creating an extensive federal statutory and regulatory scheme." *Bank of Am.*, 309 F.3d at 558. The purpose of this scheme was "to facilitate what Representative Hooper termed a 'national banking system,'" *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (footnote and citation omitted), and "to protect national banks against intrusive regulation by the States," *Bank of Am.*, 309 F.3d at 561. Accordingly, the history of national banking law is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

Nonetheless, "[s]ince shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (citation and footnote omitted). Rather, "regulation of banking has been one of dual control [with the states] since the passage of the first National Bank Act." *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). Accordingly, federal banking statutes and regulations do not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103. State laws regulating the conduct of national banks are

void only "if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561; *see also Barnett Bank*, 517 U.S. at 33-37, 116 S.Ct. 1103 (holding that a federal statute granting national banks authority to sell insurance conflicts with and therefore preempts state law forbidding banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79, 74 S.Ct. 550, 98 L.Ed. 767 (1954) (holding that national banks' power to receive deposits conflicts with and therefore preempts a state statute prohibiting use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248-49 (1944) (holding that a state statute providing for transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

In light of the historic dual regulation of banks by state and federal law, we conclude that the district court erred in determining that the dismiss-at-pleasure provision of the National Bank Act preempts the entire field of law governing national banks' employment practices. Indeed, the at-pleasure provision is not accompanied by a pervasive regulatory scheme that governs the dismissal of bank officers, " 'the mere volume and complexity' " of which "demonstrate[s] an implicit congressional intent to displace all state law." *Bank of Am.*, 309 F.3d at 558 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000)). Rather, the National Bank Act simply contains one undefined clause – "dismiss such officers or any of them at pleasure." 12 U.S.C. § 24(Fifth). This clause does not

reflect that Congress's clear and manifest purpose was preemption of the entire field of state law.

We therefore must determine the intended purpose and scope of the at-pleasure provision and, given that scope, whether the WLAD "conflict[s] with federal law, frustrate[s] the purposes of the National Bank Act, or impair[s] the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561.[2] The meaning and scope of the at-pleasure provision is not defined by statute, regulations, or legislative history. In fact, the only evidence of congressional intent regarding the purpose and scope of the National Bank Act provision is provided by case law.

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[2] In determining the intended scope of § 24(Fifth), we also consider the judicial constructions of the virtually identical dismiss-at-pleasure provisions in the Federal Reserve Act, 12 U.S.C. § 341(Fifth), and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a).

Under the Federal Reserve Act, a Federal Reserve Bank has the power "[t]o appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees.*" 12 U.S.C. § 341(Fifth) (emphasis added).

Similarly, under the Federal Home Loan Bank Act, the board of directors of each Federal Home Loan Bank has the power "to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, to define their duties, require bonds of them and fix the penalties thereof, and *to dismiss at pleasure such officers.*" 12 U.S.C. § 1432(a) (emphasis added).

Courts that have considered these provisions have interpreted them consistently with each other and with the at-pleasure clause of the National Bank Act. *See, e.g., Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983).

An early leading case addressing the at-pleasure clause explained the purpose of the provision as follows:

> Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success – to the very existence – of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of congress to which we have referred was inserted, ex industria, to provide for this very contingency.

Westervelt v. Mohrenstecher, 76 F. 118, 122 (8th Cir. 1896). Thus, "[t]he original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity." Sharon A. Kahn &

Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change*, 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999). Accordingly, courts uniformly have concluded that a bank's power to "dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee." *Katsiavelos v. Fed. Reserve Bank*, 1995 WL 103308, at *2 (N.D. Ill. Mar. 3, 1995); *see also Mele*, 359 F.3d at 255; *Booth v. Old Nat'l Bank*, 900 F. Supp. 836, 843 (N.D.W. Va. 1995); *Mueller v. First Nat'l Bank*, 797 F. Supp. 656, 663 (C.D. Ill. 1992); *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995); *Sargent v. Cent. Nat'l Bank & Trust Co.*, 809 P.2d 1298, 1303 (Okla. 1991).[3]

Similarly, we have concluded that the at-pleasure provision of the National Bank Act bars contract claims challenging a bank's dismissal of an officer. *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (holding that § 24(Fifth) "has been consistently interpreted to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ"). We further have concluded that

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[3] One commentator has argued, however, that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void. *See* M.B.W. Sinclair, *Employment At Pleasure: An Idea Whose Time Has Passed*, 23 U. Tol. L. Rev. 531 (1992). At the time Congress enacted the National Bank Act, "if an employment contract was not for a definite term, then it was presumed to be for a year." *Id.* at 540. Thus, the "original purpose of the 'at pleasure' language of the . . . National Bank Act was to enable banks to remove officers who otherwise would be entitled, by law, to remain at least until the end of the year." *Id.* at 541. According to this argument, as at-will employment became the norm, the at-pleasure provisions became superfluous. *Id.*

"the National Bank Act raise[s] a defense to both . . . contract and tort claims." *Id.* at 525. In *Mackey*, we explained,

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

We also have held that the at-pleasure provision in the Federal Home Loan Act, 12 U.S.C. § 1432(a), bars state tort wrongful discharge claims. *See Inglis*, 701 F.2d at 97. In *Inglis*, we considered a wrongful discharge claim based upon the California law exception to at-will termination under *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980). *Inglis*, 701 F.2d at 99. We held that the plaintiff's claim, which alleged that "the reason for his termination was his insistence that the Bank conform its practices to federal law," was preempted by the Federal Home Loan Act, 12 U.S.C. § 1432(a). *Id.; see also Bollow v. Fed. Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981) (holding that Federal Reserve Bank employee's claims alleging a right to a hearing before termination under state law conflicted with and were preempted by the at-pleasure provision in 12 U.S.C. § 341(Fifth)).

We again addressed a bank's authority to dismiss a bank officer under an at-pleasure provision in *Walleri v.*

Fed. Home Loan Bank, 83 F.3d 1575 (9th Cir. 1996). In *Walleri*, we concluded that the Federal Home Loan Bank Act at-pleasure provision, 12 U.S.C. § 1432(a), preempted a state wrongful discharge claim alleging that the bank wrongfully terminated the plaintiff because she prepared a report critical of the bank's lack of compliance with the federal banking laws. *Walleri*, 83 F.3d at 1578-79, 1582. We also held that Walleri's emotional distress claim was preempted. Although we recognized that the bank's power to dismiss "at pleasure" would not "necessarily preempt [] claims based on an employer's wrongful act directed at the employee outside of the employment relationship . . . , the conduct complained of [in the plaintiff's emotional distress allegations] relate[d] solely to the employment relationship." *Id.* at 1582. We therefore affirmed the dismissal of the emotional distress claim, concluding "[w]hen § 1432(a) vested power in the Federal Home Loan Banks to 'select, employ, and fix the compensation of . . . [their] employees . . . to define their duties . . . and to dismiss [them] at pleasure . . . ' it left no room for oversight under state law over the manner in which that power is exercised." *Id.* (alterations in original).

C.

In light of our past holdings delineating the preemptive scope of the banking laws' dismiss-at-pleasure provisions, the Bank argues that § 24(Fifth) also preempts Kroske's claim under the WLAD. To support this contention the Bank cites the Sixth Circuit's ruling in *Leon v. Fed. Reserve Bank*, 823 F.2d 928 (6th Cir. 1987). In *Leon*, the Sixth Circuit concluded that the Elliott-Larsen Act, Michigan's anti-discrimination statute, Mich. Comp. Laws Ann. §§ 37.2101-.2804, was preempted by the Federal

Reserve Act's at-pleasure provision, 12 U.S.C. § 341(Fifth). *Leon*, 823 F.2d at 931. With little analysis of the issue, the court concluded that the at-pleasure provision "preempts any state-created employment right to the contrary," including the plaintiff's claim under the state anti-discrimination law. *Id.; see also Arrow*, 358 F.3d at 393 (applying *Leon* and holding that a state anti-discrimination claim was preempted).

We disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes enacted under a state's police powers are preempted by the banking laws simply because they are part of a general category of "state-created employment right[s]." Unlike the cases involving state common law employment claims, here we are confronted with a state statute prohibiting discrimination, which is modeled after and incorporated into the federal anti-discrimination laws. Thus, federal preemption of the WLAD must be considered in light of Congress's enactment of relevant federal employment discrimination laws and the cooperative state-federal anti-discrimination scheme.[4]

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[4] We note that in *Moodie v. Fed. Reserve Bank*, 831 F. Supp. 333, 337 (S.D.N.Y. 1993), the district court similarly rejected the Sixth Circuit's holding in *Leon*, 823 F.2d at 932. In *Moodie*, the district court concluded,

> [n]othing in the plain language of [12 U.S.C.] § 341[, which authorizes Reserve Banks to dismiss certain officers and employees "at pleasure,"] supports the Bank's view that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation.

831 F. Supp. at 337. The court held that "[t]he New York State Human Rights Law, with provisions analogous to Title VII, creates no additional

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Federal anti-discrimination statutes are relevant to our inquiry because federally chartered banks are not exempt from liability under these laws. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984) (holding that members of a class of black employees of a Federal Reserve Bank could maintain separate actions against the bank under Title VII); *see also* Enforcement Guidance on Coverage of Federal Reserve Banks, EEOC Decision No. N-915-002 (1993) (concluding that Federal Reserve Banks are not executive agencies and are covered by Title VII, the ADEA, the Equal Pay Act ("EPA"), and the Americans with Disabilities Act ("ADA") as private employers). Indeed, courts that have addressed the issue consistently have held that banks are subject to liability for discrimination under federal anti-discrimination laws irrespective of the bank's right to dismiss an officer (or employee) "at pleasure." *See, e.g., Leon*, 823 F.2d at 931 (noting that plaintiff could have brought her discrimination claim under Title VII); *Diniz v. Fed. Reserve Bank*, 2004 WL 2043127, at *2 (N.D. Cal. Sept. 13, 2004) (holding that the Federal Reserve Bank may be sued for violations of Title VII); *Mueller*, 797 F. Supp. at 663 (holding that § 24(Fifth) does not bar a discrimination claim under the ADEA).

Here, because Kroske has alleged age discrimination under the WLAD, we are particularly concerned with the congressional intent expressed in the enactment of the

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employment rights in conflict with the Bank's status as an employer at will, nor does it place additional constraints on the Bank's exercise of its statutory powers." *Id.; see also Moodie v. Fed. Reserve Bank*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993) (denying motion to reargue motion for summary judgment, concluding that "Congress did not intend 12 U.S.C. § 341(5) to preempt state anti-discrimination laws that are consistent with federal anti-discrimination legislation").

ADEA, which prohibits discrimination in employment on the basis of age. *See* 29 U.S.C. § 623. The ADEA is part of "an ongoing congressional effort to eradicate discrimination in the workplace, [and] reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). Accordingly, the ADEA shares a common purpose with Title VII,[5] the paramount federal anti-discrimination statute: to eliminate discrimination in employment and to remedy the effects of such discriminatory conduct. *Id.* at 358. Because the anti-discrimination laws are part of a consistent remedial scheme, "[t]he substantive, anti-discrimination provisions of the ADEA are modeled upon the prohibitions of Title VII." *Id.* at 357; *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

The anti-discrimination provisions of the ADEA conflict with the banks' authority to dismiss officers "at pleasure." As a result, we must give effect to the congressional intent expressed in the ADEA by limiting the power granted to banks through § 24(Fifth). We recognize that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We have held, however, that § 24(Fifth) grants banks "the greatest latitude possible to hire and fire their chief operating officers." *Mackey*, 867 F.2d at 526. In light of the broad power extended to banks to dismiss officers "at pleasure" without limitation, we are not able to harmonize

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[5] Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

§ 24(Fifth) with the ADEA's prohibition against discrimination.

Rather, we conclude that the two provisions are in irreconcilable conflict with regard to the banks' power to dismiss an officer on the basis of age. "There is no ambiguity as to the nature of the remedial scheme Congress enacted in [the ADEA], and that scheme simply cannot work if [§ 24(Fifth)] is allowed to operate concurrently." *Kee Leasing Co. v. McGahan* (*In re Glacier Bay*), 944 F.2d 577, 583 (9th Cir. 1991). Although "repeals by implication are not favored," *Morton*, 417 U.S. at 549 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497 (1936)), where "'provisions in the two acts[, such as the provisions at issue,] are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas*, 296 U.S. at 503).

However, when, as here, "two statutes are partially in conflict, '[r]epeal is to be regarded as implied . . . only to the minimum extent necessary.'" *In re Glacier Bay*, 944 F.2d at 582 (first alteration in original) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). We therefore conclude that the dismiss-at-pleasure provision of § 24(Fifth) is repealed by implication only to the extent necessary to give effect to the ADEA; accordingly, the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the prohibitions against discrimination enumerated in the ADEA.

It follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act. The WLAD provides

that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age." Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA. *See Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n. 1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law. . . . "); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (1988) (holding that because Wash. Rev. Code § 49.60.180 "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the ADEA). Thus, in the absence of clear congressional intent to the contrary, we hold that Kroske's claim of age discrimination under the WLAD is not preempted by § 24(Fifth), as limited by the ADEA. *Cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101-06 (1983) (holding that state anti-discrimination laws are not expressly preempted by ERISA insofar as they are consistent with Title VII); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (concluding that state disability law is not preempted by the Airline Deregulation Act based, in part, on the fact that pilots are not exempt from the Americans with Disabilities Act).

Our conclusion is buttressed by the "importance of state fair employment laws to the federal enforcement scheme." *Shaw*, 463 U.S. at 102. Certainly, "many States look to Title VII[, the model for the ADEA,] as a matter of course in defining the scope of their laws." *Id.* at 106. Moreover, parallel state anti-discrimination laws are explicitly made part of the enforcement scheme for the federal laws. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 n. 1 (9th Cir. 1994). Not only does the

ADEA disclaim any preemptive effect on state laws, *see* 29 U.S.C. § 633(a), it also incorporates consistent state anti discrimination laws to serve as the primary enforcement mechanism of the enumerated rights, *see id.* §§ 626(d)(2), 633(b).

Indeed, the ADEA, like Title VII, provides that, in states with anti-discrimination laws that prohibit the conduct the complainant alleges, the state administrative agency has exclusive jurisdiction over a charge of discrimination for the first sixty days after the charge is filed. *See id.* § 633(b); *see also Oscar Mayer & Co.*, 441 U.S. at 755 (stating that § 14(b) of the ADEA, 29 U.S.C. § 633(b), was "patterned after and is virtually in *haec verba* with § 706(c) of Title VII," 42 U.S.C. § 2000e-5(c)). Congress intended for these provisions "to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Id.* (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). They were "intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Id.*

Here, Kroske brought her suit under the WLAD, which, pursuant to the State's police powers,

> declares that practices of discrimination against any of [Washington's] inhabitants because of race, creed, color, national origin, families with children, sex, marital status, *age*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only

> the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

Wash. Rev. Code § 49.60.010 (emphasis added). It further creates the Washington Human Rights Commission, a designated Fair Employment Practices ("FEP") agency under 29 C.F.R. § 1601.74, and grants the agency general jurisdiction and necessary "powers with respect to elimination and prevention of discrimination." Wash. Rev. Code. § 49.60.010.

Specifically, as discussed, Kroske alleges that the Bank terminated her in violation of the WLAD, *id.* § 49.60.180(2), which provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age."[6] This provision is consistent with the substantive provisions of the ADEA and plays an integral role in the enforcement of the federal anti-discrimination scheme. *See Oscar Mayer & Co.*, 441 U.S. at 756. The nature of the collaborative anti-discrimination scheme and the WLAD's

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[6] Wash. Rev. Code § 49.44.090 further provides, in relevant part:

> It shall be an unfair practice (1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

function in it supports our conclusion that Kroske's age discrimination claim, which is substantively the same as a claim of age discrimination under the ADEA, is not preempted by the Bank's power to dismiss officers "at pleasure" under § 24(Fifth).

We are mindful, however, of Congress's intent to create a national banking system with "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891). We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted. *Cf. Shaw*, 463 U.S. at 101-06 (holding that New York's Human Rights Law is not preempted under ERISA insofar as it prohibits practices that are covered under Title VII).

In sum, we conclude that the congressional enactment of the ADEA has placed limits on the Bank's authority to dismiss officers "at pleasure" under § 24(Fifth). In light of the ADEA's prohibition against age discrimination and the integral role of state anti-discrimination laws in the federal anti-discrimination scheme, we conclude that Congress did not intend for § 24(Fifth) to preempt the WLAD employment discrimination provisions, at least insofar as they are consistent with the prohibited grounds for termination under the ADEA. Thus, Kroske's claim of age discrimination under the WLAD is not barred.

IV. Conclusion

We conclude that diversity jurisdiction is proper. We also conclude that Kroske's age discrimination claim under the WLAD is not preempted by the National Bank Act. We therefore reverse the district court's grant of summary judgment in favor of U.S. Bank Corp. and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

432 F.3d 976

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KATHY KROSKE, an individual,
Plaintiff-Appellant,

v.

US BANK CORP., a foreign corporation; dba US BANK
Defendants-Appellees.

No. 04-35187

D.C. No.
CV-02-00439-RHW

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 15, 2005 – Seattle, Washington

Filed December 23, 2005

Before: A. Wallace Tashima, Richard A. Paez, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Paez

COUNSEL

Christine M. Weaver & Sean D. Jackson, Miller, Devlin, McLean & Weaver, P.S., Spokane, Washington, for the plaintiff-appellant.

Thomas Bassett & Angel Rains, Lukins & Annis P.S., Spokane, Washington, for the defendant-appellant.

OPINION

PAEZ, Circuit Judge:

Kathy Kroske appeals the district court's order granting Defendant U.S. Bank Corp.'s motion for summary judgment, dismissing Kroske's age discrimination claim under the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400. Kroske first contends that the district court erroneously concluded that the amount in controversy exceeded $75,000 and therefore improperly determined that it had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Kroske further argues that the district court erroneously concluded that the National Bank Act, 12 U.S.C. §§ 21-216d, preempts her age discrimination claim under the WLAD. We have jurisdiction under 28 U.S.C. § 1291. We conclude that diversity jurisdiction is proper and that Kroske's age discrimination claim under the WLAD was not preempted. Accordingly, we reverse and remand.

I. Background

U.S. Bank Corp., a Delaware corporation, is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21. The Bank is governed by a board of directors, which is empowered by the Bank's bylaws to elect and discharge officers.

Kathy Kroske began working for the Bank in 1977 as a teller. On April 20, 1993, the Bank's board of directors elected Kroske as an officer in the role of Assistant Vice President. During restructuring due to a merger, the Bank changed Kroske's position from retail market manager to manager of the Manito bank branch in Spokane, Washington. As

manager, Kroske was notified that her branch was not meeting the Bank's goals and quotas for business activity. Although Kroske contends that her branch was the smallest in the area with the fewest employees, and that she was short-staffed, the Bank continued to insist that her branch meet fixed business activity levels and warned that she would be disciplined if it did not. Ultimately, in July 2002, the Bank terminated Kroske for allegedly failing to meet the daily performance goals. The board of directors subsequently ratified Kroske's termination in a meeting convened in Minneapolis, Minnesota.

Kroske filed suit in Washington State Superior Court against the Bank. She alleged that at the time of her termination, the other branch managers in the region were in their twenties and thirties, while Kroske was fifty-one years old. Further, the Bank allegedly gave these younger managers a reasonable opportunity to meet the business activity goals and denied Kroske such an opportunity. In addition, Kroske contended that she was replaced by an employee who was in his mid-twenties and possessed less experience than Kroske. Kroske therefore alleged that the Bank had terminated her on the basis of her age in violation of the WLAD, and sought damages, as well as attorney's fees and costs. In her complaint, Kroske did not allege any federal causes of action.

The Bank removed the case to federal court and, once in federal court, filed a motion for summary judgment arguing that Kroske's state discrimination claim was preempted by the National Bank Act, specifically 12 U.S.C. § 24(Fifth), which grants national banks the power to dismiss officers "at pleasure." Kroske opposed the motion, contending that she was not an officer under § 24(Fifth) and, in the alternative, that the National Bank

Act did not preempt her age discrimination claim under the WLAD.

The district court granted the Bank's motion for summary judgment. The court held that Kroske qualified as an "officer" under the National Bank Act. Further, the district court concluded that § 24(Fifth) preempts the field of law regulating the Bank's employment practices and therefore preempted Kroske's age discrimination claim under the WLAD. Kroske timely appealed, challenging the district court's jurisdiction and the grant of summary judgment.

II. Amount In Controversy

Kroske first contends that removal of her case to federal court was improper because the district court lacked diversity jurisdiction under 28 U.S.C. § 1332.[1] She argues that the Bank did not meet its burden of establishing that the amount in controversy exceeded $75,000. "We review de novo a district court's determination that diversity jurisdiction exists." *Breitman v. May Co. Cal.*, 37 F.3d 562, 563 (9th Cir. 1994). The factual determinations necessary to establish diversity jurisdiction are reviewed for clear error. *Co-Efficient Energy Sys. v. CSL Indus., Inc.*, 812 F.2d 556, 557 (9th Cir. 1987).

Where, as here, "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount

[1] 28 U.S.C. § 1332(a)(1) provides, in relevant part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

in controversy exceeds $[75],000." *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002). The amount in controversy includes the amount of damages in dispute, as well as attorney's fees, if authorized by statute or contract. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). When the amount is not "facially apparent" from the complaint, "the court may consider facts in the removal petition, and may 'require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Singer*, 116 F.3d at 377 (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).

Here, Kroske's complaint alleged that "she suffered and continues to suffer economic and emotion [sic] injuries and other damages, with specific amounts to be proven at the time of trial." In response to the Bank's interrogatories, Kroske further identified the following categories of damages: lost wages, benefits including but not limited to health and mental insurance, 401(k) contributions, value of life insurance policies, stock options, and emotional distress damages, as well as attorney's fees and costs. Kroske did not, however, allege the amount of damages or fees she sought.

In determining the amount in controversy, the district court properly considered Kroske's interrogatory answers and emotional distress damage awards in similar age discrimination cases in Washington. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). Based upon a preponderance of the evidence, the court concluded that Kroske's lost wages amounted to at least $55,000, that her 401(k) contribution amounted to at least $1000, and that her emotional distress damages would add at least an

additional $25,000 to her claim. Therefore, even without including a potential award of attorney's fees, the district court found that the amount in controversy exceeded $75,000. This finding was not clearly erroneous; diversity jurisdiction properly exists in this case.

III. Preemption

Kroske contends that the district court erred in concluding that her age discrimination claim under the WLAD, Wash. Rev. Code § 49.60.180, was preempted by the National Bank Act. The National Bank Act provides that a national bank shall have the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure,* and appoint others to fill their places." 12 U.S.C. § 24(Fifth) (emphasis added). Kroske concedes that she was appointed and terminated by the board of directors and does not challenge the district court's determination that she was an "officer" under 12 U.S.C. § 24(Fifth). Kroske contends, however, that the district court erred in determining that her state law age discrimination claim is preempted by the dismiss-at-pleasure provision of § 24(Fifth). We agree.

"We review a district court's grant of summary judgment de novo." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003). Further, federal preemption is an issue of law, which we review de novo. *Id.*

A.

Under Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, it is axiomatic "that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Federal law may preempt state law under the Supremacy Clause in three ways. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). First, Congress may state its intent through an express preemption statutory provision. *Id.* at 78-79. Second, "in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79.

> Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law that actually conflicts with federal law is preempted. *Id.* "Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citation and

quotation omitted). In considering whether any of these three categories of preemption apply, however, "'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Cipollone,* 505 U.S. at 516 (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978)).

Further, "[w]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 813 n.8 (1997) (internal quotations omitted); *Rice,* 331 U.S. at 230. The presumption of non-preemption does not apply, however, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108 (2000); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n,* 410 F.3d 492, 496 (9th Cir. 2005). Here, although we recognize that there is a significant federal presence in the regulation of national banks, *see Bank of Am. v. City & County of San Francisco,* 309 F.3d 551, 559 (9th Cir. 2002), WLAD was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds. *See* Wash. Rev. Code § 49.60.010. Thus, we begin with the presumption that Congress did not intend the National Bank Act to preempt the WLAD. *Cf. PG & E Co. v. California,* 350 F.3d 932, 943 (9th Cir. 2003) (holding that presumption against preemption of generally applicable state law applies in bankruptcy area); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1328-29 (11th Cir. 2001) ("Although the federal government through the ICCTA has legislated in an area where there has been a history of significant

federal presence, . . . West Palm Beach is acting under the traditionally local police power of zoning and health and safety regulation." (footnote, citation and quotation omitted)).

B.

The at-pleasure provision of § 24(Fifth) is part of the scheme of federal laws governing the duties and powers of federally chartered banks. "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 . . . (1819), creating an extensive federal statutory and regulatory scheme." *Bank of Am.*, 309 F.3d at 558. The purpose of this scheme was "to facilitate what Representative Hooper termed a 'national banking system,'" *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (footnote and citation omitted), and "to protect national banks against intrusive regulation by the States," *Bank of Am.*, 309 F.3d at 561. Accordingly, the history of national banking law is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

Nonetheless, "[s]ince shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (citation and footnote omitted). Rather, "regulation of banking has been one of dual control [with the states] since the passage of the first National Bank Act." *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir.

1980). Accordingly, federal banking statutes and regulations do not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33. State laws regulating the conduct of national banks are void only "if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561; *see also Barnett Bank*, 517 U.S. at 33-37 (holding that a federal statute granting national banks authority to sell insurance conflicts with and therefore preempts state law forbidding banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79 (1954) (holding that national banks' power to receive deposits conflicts with and therefore preempts a state statute prohibiting use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248-49 (1944) (holding that a state statute providing for transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

In light of the historic dual regulation of banks by state and federal law, we conclude that the district court erred in determining that the dismiss-at-pleasure provision of the National Bank Act preempts the entire field of law governing national banks' employment practices. Indeed, the at-pleasure provision is not accompanied by a pervasive regulatory scheme that governs the dismissal of bank officers, "'the mere volume and complexity'" of which "demonstrate[s] an implicit congressional intent to displace all state law." *Bank of Am.*, 309 F.3d at 558 (quoting

Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000)). Rather, the National Bank Act simply contains one undefined clause – "dismiss such officers or any of them at pleasure." 12 U.S.C. § 24(Fifth). This clause does not reflect that Congress's clear and manifest purpose was preemption of the entire field of state law.

We therefore must determine the intended purpose and scope of the at-pleasure provision and, given that scope, whether the WLAD "conflict[s] with federal law, frustrate[s] the purposes of the National Bank Act, or impair[s] the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561.[2] The meaning and scope of the at-pleasure provision is not defined by statute, regulations, or legislative history. In fact, the only evidence of congressional intent regarding the purpose and

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[2] In determining the intended scope of § 24(Fifth), we also consider the judicial constructions of the virtually identical dismiss-at-pleasure provisions in the Federal Reserve Act, 12 U.S.C. § 341(Fifth), and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a).

Under the Federal Reserve Act, a Federal Reserve Bank has the power "[t]o appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees.*" 12 U.S.C. § 341(Fifth) (emphasis added).

Similarly, under the Federal Home Loan Bank Act, the board of directors of each Federal Home Loan Bank has the power "to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, to define their duties, require bonds of them and fix the penalties thereof, and *to dismiss at pleasure such officers.*" 12 U.S.C. § 1432(a) (emphasis added).

Courts that have considered these provisions have interpreted them consistently with each other and with the at-pleasure clause of the National Bank Act. *See, e.g., Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983).

scope of the National Bank Act provision is provided by case law.

An early leading case addressing the at-pleasure clause explained the purpose of the provision as follows:

> Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success – to the very existence – of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of congress to which we have referred was inserted, ex industria, to provide for this very contingency.

Westervelt v. Mohrenstecher, 76 F. 118, 122 (8th Cir. 1896). Thus, "[t]he original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the

financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity." Sharon A. Kahn & Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change,* 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999). Accordingly, courts uniformly have concluded that a bank's power to "dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee." *Katsiavelos v. Fed. Reserve Bank,* 1995 WL 103308, at *2 (N.D. Ill. Mar. 3, 1995); *see also Mele,* 359 F.3d at 255; *Booth v. Old Nat'l Bank,* 900 F. Supp. 836, 843 (N.D. W. Va. 1995); *Mueller v. First Nat'l Bank,* 797 F. Supp. 656, 663 (C.D. Ill. 1992); *White v. Fed. Reserve Bank,* 660 N.E.2d 493, 496 (Ohio Ct. App. 1995); *Sargent v. Cent. Nat'l Bank & Trust Co.,* 809 P.2d 1298, 1303 (Okla. 1991).[3]

Similarly, we have concluded that the at-pleasure provision of the National Bank Act bars contract claims challenging a bank's dismissal of an officer. *See Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 524 (9th Cir. 1989) (holding that § 24(Fifth) "has been consistently interpreted

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[3] One commentator has argued, however, that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void. *See* M.B.W. Sinclair, *Employment At Pleasure: An Idea Whose Time Has Passed,* 23 U. Tol. L. Rev. 531 (1992). At the time Congress enacted the National Bank Act, "if an employment contract was not for a definite term, then it was presumed to be for a year." *Id.* at 540. Thus, the "original purpose of the 'at pleasure' language of the . . . National Bank Act was to enable banks to remove officers who otherwise would be entitled, by law, to remain at least until the end of the year." *Id.* at 541. According to this argument, as at-will employment became the norm, the at-pleasure provisions became superfluous. *Id.*

to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ"). We further have concluded that "the National Bank Act raise[s] a defense to both . . . contract and tort claims." *Id.* at 525. In *Mackey,* we explained,

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

We also have held that the at-pleasure provision in the Federal Home Loan Act, 12 U.S.C. § 1432(a), bars state tort wrongful discharge claims. *See Inglis,* 701 F.2d at 97. In *Inglis,* we considered a wrongful discharge claim based upon the California law exception to at-will termination under *Tameny v. Atl. Richfield Co.,* 610 P.2d 1330 (Cal. 1980). *Inglis,* 701 F.2d at 99. We held that the plaintiff's claim, which alleged that "the reason for his termination was his insistence that the Bank conform its practices to federal law," was preempted by the Federal Home Loan Act, 12 U.S.C. § 1432(a). *Id.*; *see also Bollow v. Fed. Reserve Bank,* 650 F.2d 1093 (9th Cir. 1981) (holding that Federal Reserve Bank employee's claims alleging a right to a hearing before termination under state law

conflicted with and were preempted by the at-pleasure provision in 12 U.S.C. § 341(Fifth)).

We again addressed a bank's authority to dismiss a bank officer under an at-pleasure provision in *Walleri v. Fed. Home Loan Bank*, 83 F.3d 1575 (9th Cir. 1996). In *Walleri*, we concluded that the Federal Home Loan Bank Act at-pleasure provision, 12 U.S.C. § 1432(a), preempted a state wrongful discharge claim alleging that the bank wrongfully terminated the plaintiff because she prepared a report critical of the bank's lack of compliance with the federal banking laws. *Walleri*, 83 F.3d at 1578-79, 1582. We also held that Walleri's emotional distress claim was preempted. Although we recognized that the bank's power to dismiss "at pleasure" would not "necessarily preempt [] claims based on an employer's wrongful act directed at the employee outside of the employment relationship . . . , the conduct complained of [in the plaintiff's emotional distress allegations] relate[d] solely to the employment relationship." *Id.* at 1582. We therefore affirmed the dismissal of the emotional distress claim, concluding "[w]hen § 1432(a) vested power in the Federal Home Loan Banks to 'select, employ, and fix the compensation of . . . [their] employees . . . to define their duties . . . and to dismiss [them] at pleasure . . . ' it left no room for oversight under state law over the manner in which that power is exercised." *Id.* (alterations in original).

C.

In light of our past holdings delineating the preemptive scope of the banking laws' dismiss-at-pleasure provisions, the Bank argues that § 24(Fifth) also preempts Kroske's claim under the WLAD. To support this contention the

Bank cites the Sixth Circuit's ruling in *Leon v. Fed. Reserve Bank,* 823 F.2d 928 (6th Cir. 1987). In *Leon,* the Sixth Circuit concluded that the Elliott-Larsen Act, Michigan's anti-discrimination statute, Mich. Comp. Laws Ann. §§ 37.2101-.2804, was preempted by the Federal Reserve Act's at-pleasure provision, 12 U.S.C. § 341(Fifth). *Leon,* 823 F.2d at 931. With little analysis of the issue, the court concluded that the at-pleasure provision "preempts any state-created employment right to the contrary," including the plaintiff's claim under the state anti-discrimination law. *Id.; see also Arrow,* 358 F.3d at 393 (applying *Leon* and holding that a state anti-discrimination claim was preempted).

We disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes enacted under a state's police powers are preempted by the banking laws simply because they are part of a general category of "state-created employment right[s]." Unlike the cases involving state common law employment claims, here we are confronted with a state statute prohibiting discrimination, which is modeled after and incorporated into the federal anti-discrimination laws. Thus, federal preemption of the WLAD must be considered in light of Congress's enactment of relevant federal employment discrimination laws and the cooperative state-federal anti-discrimination scheme.[4]

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[4] We note that in *Moodie v. Fed. Reserve Bank,* 831 F.Supp. 333, 337 (S.D.N.Y. 1993), the district court similarly rejected the Sixth Circuit's holding in *Leon,* 823 F.2d at 932. In *Moodie,* the district court concluded,

> [n]othing in the plain language of [12 U.S.C.] § 341[, which authorizes Reserve Banks to dismiss certain officers and

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Federal anti-discrimination statutes are relevant to our inquiry because federally chartered banks are not exempt from liability under these laws. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984) (holding that members of a class of black employees of a Federal Reserve Bank could maintain separate actions against the bank under Title VII); *see also* Enforcement Guidance on Coverage of Federal Reserve Banks, EEOC Decision No. N-915-002 (1993) (concluding that Federal Reserve Banks are not executive agencies and are covered by Title VII, the ADEA, the Equal Pay Act ("EPA"), and the Americans with Disabilities Act ("ADA") as private employers). Indeed, courts that have addressed the issue consistently have held that banks are subject to liability for discrimination under federal anti-discrimination laws irrespective of the bank's right to dismiss an officer (or employee) "at pleasure." *See, e.g., Leon*, 823 F.2d at 931 (noting that plaintiff could have brought her discrimination claim under Title VII); *Diniz v. Fed. Reserve Bank*, 2004 WL 2043127, at *2 (N.D. Cal. Sept. 13, 2004) (holding that the Federal

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employees "at pleasure,"] supports the Bank's view that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation.

831 F. Supp. at 337. The court held that "[t]he New York State Human Rights Law, with provisions analogous to Title VII, creates no additional employment rights in conflict with the Bank's status as an employer at will, nor does it place additional constraints on the Bank's exercise of its statutory powers." *Id.; see also Moodie v. Fed. Reserve Bank*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993) (denying motion to reargue motion for summary judgment, concluding that "Congress did not intend 12 U.S.C. § 341(5) to preempt state anti-discrimination laws that are consistent with federal anti-discrimination legislation").

Reserve Bank may be sued for violations of Title VII); *Mueller,* 797 F.Supp. at 663 (holding that § 24(Fifth) does not bar a discrimination claim under the ADEA).

Here, because Kroske has alleged age discrimination under the WLAD, we are particularly concerned with the congressional intent expressed in the enactment of the ADEA, which prohibits discrimination in employment on the basis of age. *See* 29 U.S.C. § 623. The ADEA is part of "an ongoing congressional effort to eradicate discrimination in the workplace, [and] reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 357 (1995). Accordingly, the ADEA shares a common purpose with Title VII,[6] the paramount federal anti-discrimination statute: to eliminate discrimination in employment and to remedy the effects of such discriminatory conduct. *Id.* at 358. Because the anti-discrimination laws are part of a consistent remedial scheme, "[t]he substantive, anti-discrimination provisions of the ADEA are modeled upon the prohibitions of Title VII." *Id.* at 357; *see also Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985).

The anti-discrimination provisions of the ADEA conflict with the banks' authority to dismiss officers "at pleasure." As a result, we must give effect to the congressional intent expressed in the ADEA by limiting the power granted to banks through § 24(Fifth). We recognize that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v.*

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[6] Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

Mancari, 417 U.S. 535, 551 (1974). We have held, however, that § 24(Fifth) grants banks "the greatest latitude possible to hire and fire their chief operating officers." *Mackey*, 867 F.2d at 526. In light of the broad power extended to banks to dismiss officers "at pleasure" without limitation, we are not able to harmonize § 24(Fifth) with the ADEA's prohibition against discrimination.

Rather, we conclude that the two provisions are in irreconcilable conflict with regard to the banks' power to dismiss an officer on the basis of age. "There is no ambiguity as to the nature of the remedial scheme Congress enacted in[the ADEA], and that scheme simply cannot work if [§ 24(Fifth)] is allowed to operate concurrently." *Kee Leasing Co. v. McGahan (In re Glacier Bay)*, 944 F.2d 577, 583 (9th Cir. 1991). Although "repeals by implication are not favored," *Morton*, 417 U.S. at 549 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497 (1936)), where "'provisions in the two acts[, such as the provisions at issue,] are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas*, 296 U.S. at 503).

However, when, as here, "two statutes are partially in conflict, '[r]epeal is to be regarded as implied . . . only to the minimum extent necessary.'" *In re Glacier Bay*, 944 F.2d at 582 (first alteration in original) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). We therefore conclude that the dismiss-at-pleasure provision of § 24(Fifth) is repealed by implication only to the extent necessary to give effect to the ADEA; accordingly, the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the

prohibitions against discrimination enumerated in the ADEA.

It follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act. The WLAD provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age." Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA. *See Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law. . . ."); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (Wash. 1988) (holding that because Wash. Rev. Code § 49.60.180 "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the ADEA). Thus, in the absence of clear congressional intent to the contrary, we hold that Kroske's claim of age discrimination under the WLAD is not preempted by § 24(Fifth), as limited by the ADEA.[6] *Cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85,

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[6] We note that the California Court of Appeal reached a similar conclusion in *Marques v. Bank of Am.*, 69 Cal. Rptr. 2d 154 (Ct. App. 1998). Relying on principles of repeal by implication, the court concluded, "[s]ince, under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory, state antidiscrimination statutes prohibiting such terminations are not preempted." *Id.* at 159. Similarly, in *Peatros v. Bank of Am., NT & SA*, 990 P.2d 539 (Cal. 2000), the California Supreme Court concluded that Title VII and the ADEA impliedly amended the National Bank Act and therefore § 24(Fifth) "grants a national bank a limited power to dismiss any of its officers at pleasure by its board of directors, not extending to dismissal on the ground of race, color, religion, sex, national origin, or age." *Id.* at 551. Thus, "[a]s impliedly amended by Title VII and the ADEA, section 24,

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101-06 (1983) (holding that state anti-discrimination laws are not expressly preempted by ERISA insofar as they are consistent with Title VII); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (concluding that state disability law is not preempted by the Airline Deregulation Act based, in part, on the fact that pilots are not exempt from the Americans with Disabilities Act).

Our conclusion is buttressed by the "importance of state fair employment laws to the federal enforcement scheme." *Shaw*, 463 U.S. at 102. Certainly, "many States look to Title VII[, the model for the ADEA,] as a matter of course in defining the scope of their laws." *Id.* at 106. Moreover, parallel state anti-discrimination laws are explicitly made part of the enforcement scheme for the federal laws. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994). Not only does the ADEA disclaim any preemptive effect on state laws, *see* 29 U.S.C. § 633(a), it also incorporates consistent state anti discrimination laws to serve as the primary enforcement mechanism of the enumerated rights, *see id.* §§ 626(d)(2), 633(b).

Indeed, the ADEA, like Title VII, provides that, in states with anti-discrimination laws that prohibit the conduct the complainant alleges, the state administrative agency has exclusive jurisdiction over a charge of discrimination for the first sixty days after the charge is filed. *See id.* § 633(b); *see also Oscar Mayer & Co.*, 441 U.S. at

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Fifth, preempts [California's Fair Employment and Housing Act] to the extent that it conflicts, but it does not to the extent that it does not." *Id.* at 540.

755 (stating that § 14(b) of the ADEA, 29 U.S.C. § 633(b), was "patterned after and is virtually in *haec verba* with § 706(c) of Title VII," 42 U.S.C. § 2000e-5(c)). Congress intended for these provisions "to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Id.* (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). They were "intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Id.*

Here, Kroske brought her suit under the WLAD, which, pursuant to the State's police powers,

> declares that practices of discrimination against any of [Washington's] inhabitants because of race, creed, color, national origin, families with children, sex, marital status, *age*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

Wash. Rev. Code § 49.60.010 (emphasis added). It further creates the Washington Human Rights Commission, a designated Fair Employment Practices ("FEP") agency under 29 C.F.R. § 1601.74, and grants the agency general jurisdiction and necessary "powers with respect to elimination and prevention of discrimination." Wash. Rev. Code. § 49.60.010.

Specifically, as discussed, Kroske alleges that the Bank terminated her in violation of the WLAD, *id.*

§ 49.60.180(2), which provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age."[7] This provision is consistent with the substantive provisions of the ADEA and plays an integral role in the enforcement of the federal anti-discrimination scheme. *See Oscar Mayer & Co.*, 441 U.S. at 756. The nature of the collaborative anti-discrimination scheme and the WLAD's function in it supports our conclusion that Kroske's age discrimination claim, which is substantively the same as a claim of age discrimination under the ADEA, is not preempted by the Bank's power to dismiss officers "at pleasure" under § 24(Fifth).

We are mindful, however, of Congress's intent to create a national banking system with "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891). We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in

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[7] Wash. Rev. Code § 49.44.090 further provides, in relevant part:

> It shall be an unfair practice (1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted. *Cf. Shaw*, 463 U.S. at 101-06 (holding that New York's Human Rights Law is not preempted under ERISA insofar as it prohibits practices that are covered under Title VII).

In sum, we conclude that the congressional enactment of the ADEA has placed limits on the Bank's authority to dismiss officers "at pleasure" under § 24(Fifth). In light of the ADEA's prohibition against age discrimination and the integral role of state anti-discrimination laws in the federal anti-discrimination scheme, we conclude that Congress did not intend for § 24(Fifth) to preempt the WLAD employment discrimination provisions, at least insofar as they are consistent with the prohibited grounds for termination under the ADEA. Thus, Kroske's claim of age discrimination under the WLAD is not barred.

IV. Conclusion

We conclude that diversity jurisdiction is proper. We also conclude that Kroske's age discrimination claim under the WLAD is not preempted by the National Bank Act. We therefore reverse the district court's grant of summary judgment in favor of U.S. Bank Corp. and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHY KROSKE, an individual, Plaintiff, v. U.S. BANCORP, a foreign corporation, d/b/a U.S. BANK, Defendant.	NO. CS-02-0439-RHW **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Jan. 29, 2004)

Before the Court is Defendant U.S. Bancorp's Motion for Summary Judgment (Ct. Rec. 19). This action was filed by Plaintiff Kathy Kroske in Spokane County Superior Court and removed by Defendant U.S. Bancorp ("Bancorp") on December 23, 2002. This Court has diversity jurisdiction over Plaintiff's claim. 28 U.S.C. § 1332. Defendant asserts that Plaintiff's Washington state claim for age discrimination is preempted by the National Bank Act.

FACTS

The Defendant, U.S. Bancorp, d/b/a U.S. Bank, is a federally chartered national banking association, which was formed in accordance with Section 21 of the National Bank Act. 12 U.S.C. § 21.

On April 20, 1993, U.S. Bank's Board of Director's elected Ms. Kroske as an U.S. Bank "Assistant Vice President." On or about August 1, 2001, as a result of acquisitions, Ms. Kroske's title was changed from "Retail

Market Manager" to "Branch Manager" of the Manito bank branch in Spokane, Washington. U.S. Bank terminated Ms. Kroske on July 17, 2002. On September 23, 2002 the U.S. Bank's Board of Directors convened in Minneapolis, Minnesota. A quorum was present. At that meeting, the Board of Directors ratified Ms. Kroske's termination.

STANDARD OF REVIEW

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

DISCUSSION

Defendant alleges that Plaintiff's age discrimination claim under the Washington Law Against Discrimination ("WALD [sic]") is preempted by the National Bank Act (the "Act"), which grants power to the board of directors of national banking associations

> to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, *and other officers*, define their duties, require bonds of them and fix the penalty thereof,

> *dismiss such officers of any of them at pleasure,* and appoint others to fill their places.

12 U.S.C. § 24 (Fifth) (emphasis added). Plaintiff raises three arguments in opposition to Defendant's summary judgment motion. First, she asserts that as an assistant vice-president and branch manager for U.S. Bank she was not an "officer" as contemplated by the National Bank Act. Second, Plaintiff argues that the National Bank Act and the WLAD do not conflict and, therefore, the WLAD is not preempted. Finally, she argues that even if the Act originally preempted the WLAD, the National Bank Act was impliedly amended by Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"), which bestowed only a qualified immunity on the boards of national banking associations to exercise their power to dismiss officers at pleasure.

A. Is Ms. Kroske an Officer as Contemplated by the National Bank Act?

Ms. Kroske claims that the National Bank Act does not apply to her claim under the WLAD because she is not an "officer" as contemplated by the National Bank Act, 12 U.S.C. § 24 (Fifth). The Defendant argues that Plaintiff's position of branch manager and Assistant Vice President were akin to the "other officers" referred to by the Act.

While the Ninth Circuit has not directly interpreted the meaning of the phrase "other officers" in the National Bank Act, in *Mackey v. Pioneer Nat'l Bank,* the court held that an "Executive Vice President" is an "officer as described by the National Bank Act" because (1) the position of vice president is specifically listed by the Act; (2) the

plaintiff was indirectly hired by the bank's board of directors through delegated authority; and (3) the plaintiff's termination was ratified in a timely manner by the bank's board of directors. 867 F.2d 520, 525 (9th Cir. 1989), citing *Mahoney v. Crocker Na'l* [sic] *Bank,* 471 F. Supp. 287, 290-91 (N.D. Cal. 1983).[1] The panel in *Mackey* next examined the purpose of the dismissal at pleasure provision of the Act and held that the "purpose ... was to give those institutions the greatest latitude possible to hire and fire their *chief operating officers,* in order to maintain the public trust." 867 F.2d at 526 (emphasis added). Based upon this overarching purpose, to qualify as "other officers" for the purposes of the Act, bank employees must have managerial roles and be involved in the operation of a bank at a high level. Moreover, the holding of *Mackey* suggests that such officers must have some impact upon the public image of the bank.

Other courts, interpreting the phrase "other officers," have looked to the National Bank Act's statutory language, legislative history and purpose for guidance. In *Alegria v. Idaho First Nat'l Bank,* the Idaho Supreme Court held that an assistant branch manager, who was responsible for "day-to-day operations" of a branch and had "full managerial duties" upon the absence of a branch manager was an "other officer" under the Act. 723 P.2d 858, 859-60 (1986).

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[1] In *Mahoney v. Crocker Nat'l Bank,* cited by the Ninth Circuit in *Mackey,* a district court in the Northern District of California did not reach the question of whether the Plaintiffs, an "Assistant Manager" and "Assistant Vice President and Manager" were "other officers." 571 F. Supp. at 290-91 (holding, however, that the bank could not employ the defense of the National Bank Act because it did not comply with its requirements for dismissing officers).

The Idaho Supreme Court reasoned that the National Bank Act represented a "Congressional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, national banks;" thus, the court held that the term officers applied to all "active officers, to whose integrity and discretion the monies and property of the bank and its customers are entrusted, [who] should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them." *Id.*, citing *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896) (additional citations omitted).

Similarly, in *Wells Fargo Bank v. Superior Court*, the California Supreme Court, in a well-reasoned opinion, held that the plaintiffs, who were appointed as assistant vice presidents and served as branch managers, qualified as "other officers" under the Act. 811 P.2d 1025 (Cal. 1991). The court laid out a four part test, based upon the statutory language, history and purpose of the Act, for determining whether a banking employee met the definition of an officer:

> *First*, he or she holds an office created by the board of directors and listed in the bank's bylaws. *Second*, he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws. *Third*, he or she has the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf. *Fourth*, his or her decision-making authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect

> potentially the public trust in the banking institution.

Id. at 1031 (citations omitted).

Under the test annunciated in *Mackey*, the Plaintiff Kroske qualifies as an "other officer" under the National Bank Act. 867 F.2d at 525-26. Plaintiff was directly hired by the board of directors and her termination was ratified by the board. As a manager of the Manito branch of U.S. Bank, Plaintiff held a managerial position and was responsible for many bank operations. Moreover, as the head of a branch, Plaintiff constituted a key part of the Defendant's public image. Under the four-step test articulated in *Wells Fargo Bank*, the Plaintiff also would qualify as an other officer under the Act. Plaintiff's office was created by the board of directors, she was directly appointed by the board of directors, she does not dispute that she had the express legal authority to bind the bank, and as branch manager, she had decision making authority that related to fundamental banking operations; finally, her termination was ratified in a timely manner by the Board of Directors. Accordingly, the Court holds that the Plaintiff is an "other officer" under the National Bank Act, 12 U.S.C. § 24 (Fifth).

B. Does the National Bank Act Preempt the Washington Law Against Discrimination?

The Defendant argues that it is entitled to Summary Judgment on the Plaintiff's WLAD claim because that claim is preempted by the National Bank Act, 12 U.S.C. § 24 (Fifth), which states that officers may be dismissed by the board of directors "at pleasure." State law is preempted when "Congress evidences an intent to occupy a

given field" and when "it actually conflicts with federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted). The burden of proving preemption is upon the party claiming it as a defense. *Id.* at 255. Courts are "generally reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978).

The question of whether a state employment discrimination act is preempted by the National Bank Act is one of first impression in the Ninth Circuit. In *Mackey v. Pioneer Nat'l Bank*, the Ninth Circuit addressed a closely-related question and found that tort and contract claims arising out of the employment relationship between a national banking association and its officers are completely preempted. 867 F.2d at 526. Implicit in the reasoning of the court's decision in *Mackey* was the notion that the National Bank Act was enacted to subject national banking associations to a uniform employment law. The court explained that "it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred .... [t]he effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer." *Id.* This rationale of uniformity also would apply to preempt state statutory discrimination claims, since those claims are little more than codified tort actions and would interfere with the national scheme of regulation.

The Supreme Court's holding that the usury provisions of the National Bank Act were intended to create a uniform and exclusive national law of regulation of national banking associations supports the notion that the "at pleasure" language was designed to subject national

banking associations to a uniform scheme of federal law. In *Beneficial Nat'l Bank v. Anderson,* after noting the "special nature of federally chartered banks," the Court opined that the National Bank Act was enacted to create "[u]niform rules limiting the liability of national banks and prescrib[e] exclusive [federal] remedies" in lieu of "possible unfriendly State legislation." 123 S. Ct. 2058, 2064 (June 2, 2003) (holding that usury provisions of National Bank Act, 12 U.S.C. §§ 85-86, preempted the field and, thus, Alabama usury legislation was void) (citations omitted). The Court explained that it was this same "federal interest that protected national banks from the state taxation that Chief Justice Marshall characterised [sic] as the 'power to destroy.'" *Id.,* citing *McCulloch v. Maryland,* 4 Wheat. 316, 431, 4 L.Ed. 579 (1819).

Ninth Circuit decisions regarding analogous banking laws also support a finding of field preemption. While the Ninth Circuit has not addressed the question of state discrimination actions directly, it has found that both the Federal Home Loan Bank Act and the Federal Reserve Act, which contain "at pleasure" language identical to that found in 12 U.S.C. § 24 (Fifth), preempt all wrongful discharge claims based upon state law. In *Walleri v. Federal Home Loan Bank of Seattle,* the court found that the "at pleasure" language of 12 U.S.C. § 1432(a) of the Federal Home Loan Bank Act preempts the field and, therefore, preempts all wrongful discharge claims under state law. 83 F.3d 1575 (9th Cir. 1996). In *Bollow v. Federal Reserve Bank,* the Ninth Circuit found that the same "at pleasure" language in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth), preempted state claims of wrongful discharge based upon denial of state due process rights. 650 F.2d 1093, 1098 (9th Cir. 1981).

Based upon this finding of field preemption, the Ninth Circuit has more strictly construed the National Bank Act than the majority of courts, which have held that the National Bank Act does not preempt state claims when the grounds for termination violate public policy. *See, i.e., Booth v. Old Nat'l Bank,* 900 F. Supp. 836, 843 (N.D.W.V. 1995); *Sargent v. Central Nat'l Bank & Trust,* 809 P.2d 1298 (Okl. 1991) (holding cause of action was not preempted for retaliatory discharge for refusing to destroy or alter audit reports); *Schey v. Trans Pac. Nat'l Bancorp,* 266 Cal. Rptr. 39 (Cal. 1990) (holding cause of action not preempted for retaliatory discharge for reporting regulatory violations). Indeed, the Ninth Circuit has held that a claim of wrongful discharge is preempted by the Federal Home Loan Bank Act, even when the grounds for termination contravene public policy. *Inglis v. Feinerman,* 701 F.2d 97, 99 (9th Cir. 1983) (officer discharged after insisting that bank conform practices to federal law). Defendant notes that if Congress had intended to carve an exception to its regulation of national banking associations when the grounds for termination violate public policy, it could have amended the Act to overcome the above interpretation. Unfortunately, during its many amendments of the Act, Congress has declined to provide such an exception.

Because the Ninth Circuit already has held that common law tort and contract claims are preempted by the National Bank Act, because the Supreme Court has held that the National Bank Act is designed to create a uniform system of legislation, and because the "at pleasure" language in the Federal Home Loan Bank Act and Federal Reserve Act, which is identical to that in the National Bank Act, has been interpreted to preempt all state

wrongful discharge claims, the Court holds that Plaintiff's claims under the WLAD are preempted.[2]

C. Was the National Bank Act Impliedly Amended by the ADEA and Title VII?

Plaintiff argues that even if the National Bank Act did originally preempt the WLAD, it has been impliedly amended by the ADEA and Title VII in such a way that it no longer preempts consistent state law. In *Mueller v. First Nat'l Bank of the Quad Cities,* a district court held that the National Bank Act did not preempt federal claims brought under the ADEA or Title VII. 797 F. Supp. 656 (C.D. Ill. 1992). The Defendant argues that while *Mueller* may very well be a valid interpretation of ADEA and Title VII, Supreme Court precedent dictates that state anti-discrimination law that is not preempted by ADEA or Title VII, still may be preempted by another federal statute. In *Shaw v. Delta Airlines Inc.,* the Supreme Court found that although "state laws play a significant role in the enforcement of Title VII" state law still could be preempted by ERISA. 463 U.S. 86, 101-02 (1983). Therefore, the Supreme Court found that ERISA preempted New York's Human Rights Law to the extent it conflicted with ERISA. *Id.*[3] In the present ease, the Court is faced with a similar

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[2] The Plaintiff asserts that the age discrimination provisions of the WLAD do not conflict with the "at pleasure" language of the National Bank Act. This opinion however rests upon field, not conflict preemption.

[3] The Plaintiff, relying on a non-majority opinion in *Peatros v. Bank of America,* asserts that since federal claims under Title VII and ADEA are not preempted by the National Bank Act, state employment discrimination claims must survive. 990 P.2d 539 (Cal. 2000) (no majority opinion). In *Peatros,* however, the majority of justices (the

(Continued on following page)

dilemma. Even assuming that Title VII and ADEA are not preempted by the National Bank Act, those federal remedies cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would upend the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches.

Therefore, the Court holds that regardless of whether a cause of action would be available to Plaintiff under federal anti-discrimination law, Title VII and ADEA cannot save her state law anti-discrimination claim from preemption under the National Bank Act. For this reason, the Court grants the Defendant's motion for summary judgment.

Accordingly, **IT IS HEREBY ORDERED**, that:

1. Defendant U.S. Bancorp's Motion for Summary Judgment (Ct. Rec. 19) is **GRANTED**.

2. The above-captioned case is **DISMISSED** with prejudice.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, to furnish copies to counsel and to **close** the file.

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main opinion and the concurring opinion) rejected the notion that the National Bank Act was impliedly amended by Title VII and ADEA, as to open the window for state anti-discrimination laws. The main opinion (four justices) in *Peatros*, held that because Title VII and ADEA did not contain "a clear expression" of intent to "append analogous state laws to the national scheme" national banking associations should not be exposed to "liability for dismissing officers in violation of state laws. . . ." *Id.* at 186-89.

DATED this 29 day of January 2004.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHY KROSKE, an individual, Plaintiff, v. U.S. BANCORP, a foreign corporation d/b/a U.S. BANK, Defendant.	NO. CS-02-0439-RHW **ORDER DETERMINING AMOUNT IN CONTROVERSY MET FOR JURISDICTIONAL PURPOSES** (Filed Jun. 02, 2003)

In the prior status conference held in this matter on April 24, 2003, the parties had not identified the amount in controversy in the case and, therefore, it was unclear whether the Court had jurisdiction. If diversity jurisdiction did not exist, then removal would have been improper. At the status conference, the Court raised the jurisdictional issue *sua sponte*, and asked the parties to brief the issue. Having now reviewed the parties' submissions, and having heard oral argument at a hearing held on May 28, 2003, the Court now finds that the amount in controversy exceeds the $75,000 threshold

DISCUSSION

Where a plaintiff's complaint does not specify the amount of damages being sought, the removing defendant bears the burden of demonstrating by a preponderance of the evidence that the amount in controversy requirement is satisfied. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir.1997); *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir.1992). This burden can easily be met if it is

facially apparent from the allegations in the complaint that plaintiff's claims exceed $75,000. *See Kenneth Rothschild Trust v. Morgan Stanley*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). If the amount in controversy is not clear on the face of the complaint, however, defendant must do more than point to a state law that might allow recovery above the jurisdictional minimum. Rather, the "defendant must submit 'summary-judgment-type evidence' to establish that the actual amount in controversy exceeds $75,000." *Singer*, 116 F.3d at 377. If defendant presents such proof, it then becomes plaintiff's burden to show, as a matter of law, that it is certain he will not recover the jurisdictional amount. *See De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411 (5th Cir.1995). In measuring the amount in controversy, a court must "'assum[e] that the allegations of the complaint are true and assum[e that] a jury [will] return[ ] a verdict for the plaintiff on all claims made in the complaint.'" *Kenneth Rothschild Trust*, 199 F. Supp. 2d. at 1001 (quoting *Jackson v. American Bankers Ins. Co. of Florida*, 976 F.Supp. 1450, 1454 (S.D. Ala.1997)).

In response to Defendant's interrogatories, Plaintiff identified the following categories of damages: "Lost wages, benefits including but not limited to health and dental insurance, 401(k) contributions, value of life insurance policies, stock options," emotional distress, and attorney's fees. Defendant maintains that Plaintiff's lost wages equal $45,000 and continue to grow in the amount of $5,000 per month because she has not found substitute employment.[1] In her answers to interrogatories, Plaintiff states that, indeed, her claim continues to grow at a rate of $5,000 per month since she has not been able to find

[1] Plaintiff's salary was $60,000 at the time she was fired.

substitute employment. Thus, Defendant argues that at the time of the status conference, Plaintiff's claim currently stands at $55,000, and is continuing to grow.[2]

Defendant claims that Plaintiff's 401(k) contribution equals between $1650 to $2200. This amount, too, continues to grow each month. Plaintiff claims the proper amount for the 401(k) contribution is closer to $1000.

Defendant notes that Plaintiff seeks emotional distress damages, but has failed to provide a dollar figure for the amount she seeks. The Court may make an independent appraisal of the amount, particularly where the Plaintiff has proven silent as to the amount she seeks. *See Bosinger v. Phillips Plastics, Corp.*, 57 F. Supp. 2d. 986, 989 (S.D. Cal. 1999). Defendant points to evidence of emotional distress damages awarded in age discrimination cases in Washington (citing to the Northwest Personal Injury Litigation Reports). The range for requested emotional distress damages in these cases ranged from

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[2] Plaintiff claims that the amount of lost wages is only that which existed at the time the case was removed. Plaintiff claims that amount was only $30,000. The case law cited by Plaintiff in support of its position does not appear to limit a determination of damages as they stand at the time of removal but, rather, simply states that the court should evaluate the *claims* as they stand at the time of removal. *See Kenneth Rothschild Trust v. Morgan Stanley*, 199 F.3d 993, 1001 (C.D. Cal. 2002). Thus, it appears that Defendant's assessment of lost wages damages is appropriate. *Cf. Cohn v. Petsmart, Inc.*, 281 F.3d 837 (9th Cir. 2002) (estimate of damages at time of removal sufficient to establish amount-in-controversy for jurisdictional purposes); *Angus v. Shiley, Inc.*, 989 F.2d 142, 146 (3d Cir. 1993) ("the amount in controversy is not measured by the low end of an open-ended claim, but rather by reasonable reading of the value of the rights being litigated."). This is particularly true, given that Plaintiff herself claims that she is entitled to $5000 more for each month that passes in which she is unable to find employment.

$25,000 to $200,000. The Court may rely on such evidence in determining the potential damages in the case. *See, e.g., Surbe v. Reliance Nat. Indem. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000) (court looked at evidence of jury verdicts to determine amount of punitive damages potentially at issue in the case where plaintiff offered no evidence as to damages sought). Thus, it seems at a minimum, the Court can presume that Plaintiff's emotional distress claim will add an additional $25,000 to the amount in controversy.

Lastly, the Court can consider attorneys fees when determining the amount in controversy for jurisdictional purposes. Where an underlying statute authorizes an award of attorney's fees, those fees are considered for amount in controversy purposes. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156, (9th Cir. 1998). Both Defendant and Plaintiff agree that this rule applies here, as the Washington Law Against Discrimination provides for attorney's fees. Plaintiff argues that Defendant has failed to establish, by a preponderance of the evidence, that the fees are large enough to satisfy the amount in controversy requirement. Defendant acknowledges that it is difficult to estimate the amount of fees that will accrue in the case, but points to two Washington cases in which an award of attorneys fees under the WLAD exceeded $40,000.

In light of the foregoing, it appears that Plaintiff's claims easily exceed $75,000, considering that her lost wages claim currently stands at $55,000, and that a conservative estimate of the damages she may attain for emotional distress stands at $25,000. This total equals $80,000, and does not take into account the attorney's fees

she may recover and damages for other benefits, which push that total higher.

Accordingly, **IT IS HEREBY ORDERED** that removal was proper in this case, as the amount-in-controversy exceeds $75,000.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, and to furnish copies to

DATED this 2 day of ~~May~~ June, 2003.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX E

The Ninth Circuit's order denying rehearing and rehearing en banc was attached by the court of appeals to the amended opinion and is reprinted *supra* at App. 1a-2a.

APPENDIX F

The National Bank Act provides at 12 U.S.C. § 24 in relevant part as follows:

Section 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

The Age Discrimination in Employment Act of 1967 provides in relevant part as follows:

29 U.S.C. § 621 provides:

Section 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 633 provides:

Section 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated:

Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

The Washington Labor Regulations provide in relevant part as follows:

§ 49.44.090

Unfair practices in employment because of age of employee or applicant – Exceptions.

It shall be an unfair practice:

(1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

(2) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination respecting individuals forty years of age or older: PROVIDED, That nothing herein shall forbid a requirement of disclosure of birth date upon any form of application for employment or by the production of a birth

certificate or other sufficient evidence of the applicant's true age after an employee is hired.

Nothing contained in this section or in RCW 49.60.180 as to age shall be construed to prevent the termination of the employment of any person who is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of this section; nor shall anything in this section or in RCW 49.60.180 be deemed to preclude the varying of insurance coverages according to an employee's age; nor shall this section be construed as applying to any state, county, or city law enforcement agencies, or as superseding any law fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for certain positions in public employment which are of such a nature as to require extraordinary physical effort, or which for other reasons warrant consideration of age factors.

The Washington Law Against Discrimination provides at Wash. Rev. Code § 49.60.010 *et seq.* in relevant part as follows:

§ 49.60.010 provides:

Purpose of chapter.

This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

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§ 49.60.120 provides in relevant part:

Certain powers and duties of commission.

The commission shall have the functions, powers and duties:

* * *

(4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

* * *

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

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§ 49.60.180 provides in relevant part:

Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age * * *, unless based upon a bona fide occupational qualification * * *.

(2) To discharge or bar any person from employment because of age * * *.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age * * *.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age * * *, unless based upon a bona fide occupational qualification * * *.

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§ 49.60.230 provides in relevant part:

Complaint may be filed with commission.

(1) Who may file a complaint:

(a) Any person claiming to be aggrieved by an alleged unfair practice may, personally or by his or her attorney, make, sign, and file with the commission a complaint in writing under oath or by declaration. The complaint shall state the name of the person alleged to

have committed the unfair practice and the particulars thereof, and contain such other information as may be required by the commission.

(b) Whenever it has reason to believe that any person has been engaged or is engaging in an unfair practice, the commission may issue a complaint.

(c) Any employer or principal whose employees, or agents, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath or by declaration asking for assistance by conciliation or other remedial action.

(2) Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination * * *.

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§ 49.60.240 provides in relevant part:

Complaint investigated – Conference, conciliation – Agreement, findings – Rules.

After the filing of any complaint, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt investigation and ascertainment of the facts alleged in the complaint. The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or that there is not reasonable cause for believing that an unfair practice has been or is being committed. A copy of said findings shall be provided to the

complainant and to the person named in such complaint, hereinafter referred to as the respondent.

If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation, and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement. No order shall be entered by the commission at this stage of the proceedings except upon such written agreement, * * *, the commission staff shall, to the extent feasible, engage in conciliation with respect to such complaint. Any conciliation agreement arising out of conciliation efforts by the commission shall be an agreement between the respondent and the complainant and shall be subject to the approval of the commission. Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the commission determines that disclosure is not required to further the purposes of this chapter.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof provided to the complainant and the respondent.

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§ 49.60.250 provides:

Hearing of complaint by administrative law judge – Limitation of relief – Penalties – Order.

(1) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairperson of the commission. The chairperson of the commission shall thereupon request the appointment of an administrative law judge under Title 34 RCW to hear the complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before the administrative law judge, at a time and place to be specified in such notice.

(2) The place of any such hearing may be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the commission: PROVIDED, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the commission who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall the member or employee participate in the deliberations of the administrative law judge in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

(3) The respondent shall file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The respondent has the right to cross-examine the complainant.

(4) The administrative law judge conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(5) If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed ten thousand dollars, and including a requirement for report of the matter on compliance. Relief available for violations of RCW 49.60.222 through 49.60.224 shall be limited to the relief specified in RCW 49.60.225.

(6) If a determination is made that retaliatory action, as defined in RCW 42.40.050, has been taken against a whistleblower, as defined in RCW 42.40.020, the administrative law judge may, in addition to any other

remedy, impose a civil penalty upon the retaliator of up to three thousand dollars and issue an order to the state employer to suspend the retaliator for up to thirty days without pay. At a minimum, the administrative law judge shall require that a letter of reprimand be placed in the retaliator's personnel file. All penalties recovered shall be paid into the state treasury and credited to the general fund.

(7) The final order of the administrative law judge shall include a notice to the parties of the right to obtain judicial review of the order by appeal in accordance with the provisions of RCW 34.05.510 through 34.05.598, and that such appeal must be served and filed within thirty days after the service of the order on the parties.

(8) If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

(9) An order dismissing a complaint may include an award of reasonable attorneys' fees in favor of the respondent if the administrative law judge concludes that the complaint was frivolous, unreasonable, or groundless.

(10) The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure.